

Supreme Court, U. S.

F I L E D

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In the Supreme Court of the United States

October Term, 1975

No. 75-1452

KIMBELL, INC., d/b/a FOODWAY,
FURR'S, INC., SAFEWAY STORES, INC., and
SHOP RITE FOODS, INC., d/b/a PIGGLY WIGGLY
Appellants,

vs.

EMPLOYMENT SECURITY COMMISSION
OF THE STATE OF NEW MEXICO

and

LANA JEAN NOLAN, *et al.*,
Appellees.

On Appeal From The Supreme Court Of The
State Of New Mexico

JURISDICTIONAL STATEMENT

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Appellants,

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**EMPLOYMENT SECURITY COMMISSION
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and

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**On Appeal From The Supreme Court Of The
State Of New Mexico**

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the Supreme Court of the State of New Mexico is unreported but is set forth in the Appendix, *infra* at p. 3a. The decision of the Supreme Court of the State of New Mexico on Appellant's Motion for Rehearing is also unreported but is set forth in the Appendix, *infra* at p. 21a.

¹This appeal concerns unemployment compensation claims by 198 individuals employed by Appellants herein. The names of all claimants are set forth in the Appendix, *infra* pp. 1a-2a.

The opinion of the Supreme Court of the State of New Mexico in *Albuquerque-Phoenix Express, Inc. v. Employment Security Commission*, which the Supreme Court for the State of New Mexico incorporated as the basis for its decision in this case is reported at . . . N.M. . . . , 554 P.2d 1161 (1975) and is set forth in the Appendix, *infra* at pp. 4a-20a.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity of §59-9-5(d), N.M. Stat. Ann. (Supp. 1975), on the ground that it is repugnant to the Constitution of the United States, insofar as the statute has been interpreted by the Supreme Court of the State of New Mexico as not disqualifying employees engaged in a strike against their employer from receipt of unemployment compensation benefits.

The decision of the Supreme Court of the State of New Mexico sought to be reviewed on this appeal was rendered on December 29, 1975. An order denying the motion for rehearing by these Appellants was entered January 15, 1976. On March 24, 1976, a timely Notice of Appeal to this Court was filed in the Supreme Court of the State of New Mexico. *See Department of Banking v. Pink*, 317 U.S. 264 (1942). As the Appellants properly and in a timely manner drew into question the validity of §59-9-5(d), N.M. Stat. Ann. (Supp. 1975), on the ground that it is repugnant to the Constitution of the United States and such contention was rejected by the Supreme Court of the State of New Mexico, this matter is appropriately brought to this Court by appeal. *See Largent v. Texas*, 318 U.S. 418 (1943); *Lawrence v. State Tax Commission*, 286 U.S. 276 (1932); *Bryant v. Zimmerman*, 278 U.S. 63 (1928).

In the event that this Court does not consider appeal the proper mode of review, Appellants request that, pursuant to 28 U.S.C. §2103, the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari as if duly presented to this Court at the time the appeal was taken.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Supremacy Clause of Article VI of the Constitution of the United States. Also involved is the labor dispute disqualification provision of §59-9-5(d) N.M. Stat. Ann. (Supp. 1975), a portion of the New Mexico Unemployment Compensation Law of 1936, §§59-9-1 through 59-9-29 N.M. Stat. Ann. (2nd. Repl. 1974) *as amended* (Supp. 1975), which provides that an applicant for unemployment compensation shall be disqualified for benefits under the following circumstances:

(d) For any week with respect to which the commission finds that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed; Provided, that this subsection shall not apply if it is shown to the satisfaction of the commission that —

(1) He is not participating in or directly interested in the labor dispute which caused the stoppage of work; and

(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or directly interested in the dispute; Provided, that if in any case separate branches of work

which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment, or other premises.

QUESTION PRESENTED BY APPEAL

Does the grant of unemployment compensation benefits to strikers by the State of New Mexico contravene the Supremacy Clause of Article VI of the Constitution of the United States by disrupting the operation of federal labor policy requiring state neutrality in the collective bargaining process?

STATEMENT OF THE CASE

1. Facts Material to the Consideration of the Question Presented.

The Appellants in this case all operate retail food stores in Albuquerque, Santa Fe and Los Alamos, New Mexico. For at least fifteen years prior to 1971, these employers associated themselves in a multi-employer bargaining unit for purposes of collective bargaining with the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 391, concerning the terms and conditions of employment of the meat department employees of these Appellants and other employers. (R. 167). On or about August 30, 1971, the Appellants entered into negotiations with Local 391 for the purpose of negotiating a collective bargaining contract to replace the agreement which was to expire on October 21, 1971. (R. 167).

Negotiations between the employers and the union progressed but were not productive of a new contract by the

expiration date of the old contract. (R. 168). During discussions on October 22, spokesmen for Local 391 informed two of the spokesmen of the Appellants herein that if agreement were not reached on that date the union would strike Appellant, Shop Rite Foods, Inc., and if necessary would proceed to strike each of the employers one at a time until they had all capitulated to the union's demands. (R. 168). The union also informed all of the employer representatives at the bargaining table that if a settlement were not reached by Saturday morning, October 23, 1971, a strike would be called against one of the employers. (R. 168). Negotiators for all of the employers informed the union representative that in order to avoid the effects of the union's "whip saw" tactics, a strike against one of the employers would be considered and treated as a strike against all of them. (R. 168).

No settlement having been reached, the employees of Shop Rite Foods, Inc., failed to report for work on October 23, 1971, and picket lines were established by Local 391 at stores owned by that company. (R. 168). Meat department employees employed by the remaining employers did report for work at their respective stores on the morning of October 23, 1971, but in response to the strike activity commenced against Shop Rite Foods, Inc., the other employers informed their employees, all members of the union, that they would not be permitted to work during the continuation of the strike against Shop Rite Foods, Inc. (R. 168). Picket lines were subsequently established at the stores of all the Appellants by members of the meat cutters union. (R. 168).

As a result of the strike, all union employees of the meat market departments of the employers in the multi-employer bargaining unit in Albuquerque, Santa Fe and Los Alamos, New Mexico, were out of work during the period from October 23, 1971, to December 4, 1971, when a

contract settlement was concluded. (R. 170). During the period of the strike claims for unemployment compensation were filed by 226 employees employed by the employers in the multi-employer bargaining unit and \$47,459 was paid in unemployment compensation benefits by the New Mexico Employment Security Commission. (R. 170). Furthermore, during the labor dispute, many of the employees received U.S. Department of Agriculture Food Stamp Assistance and almost all of them received a union strike benefit in the amount of \$50.00 per week. (Stip. Tr. of Proceedings, p.5).

The evidence established that all of the employers suffered an economic burden as a result of the labor dispute. The retail supermarket industry operates on a low profit margin. (Stip. Tr. of Proceedings, p.5). The employers continued to operate their meat markets at less than full capacity by the use of temporary replacements, but even at their height such temporary work forces were considerably smaller in number than their regular crews, ranging from 53.6% to 80.2% of normal strength. (R. 170-172). Most of the employers experienced a decrease in gross sales, some on the order of 13+, although past experience indicated that an increase in gross sales would normally have occurred during the particular time period in question. (R. 170-173). Most employers experienced higher operating expenses by reason of having to provide lodging, meals, transportation and related services to out of town temporary replacements. (R. 170-173). Most of them were forced to curtail or limit specific operations of their meat departments until the labor dispute was settled, including limiting the availability of special or custom cuts. (R. 171). Finally, most of the employers had to cease their normal methods of operation and rely on the use of pre-cut and pre-packaged products. (R. 171).

2. Manner in which the Federal Question was Raised.

On November 6, 1973, a Motion for Amendment of Petition for Writ of Certiorari was filed with the New Mexico District Court on behalf of Kimbell, Inc., Furr's, Inc., and Allied Supermarkets, Inc. The motion sought permission to amend the Petition for Writ of Certiorari filed earlier on behalf of said employers, which sought review of the decision of the Employment Security Commission of New Mexico permitting payment of unemployment compensation benefits to the striking employees of said employers, by adding thereto an allegation that payment of benefits would contravene the Supremacy Clause of Article VI of the Constitution of the United States. (R. 157). The order permitting the amendment was entered by the district court on November 7, 1973. (R. 160). A similar motion was filed on behalf of Safeway Stores, Inc. and Shop Rite Foods, Inc. on December 3, 1973, and an order permitting the amendments was entered by the district court on the same date. (R. 162-164).

On October 11, 1974, the New Mexico District Court entered its Findings of Fact and Conclusions of Law in which it concluded in pertinent part that:

Under the facts of this case payment of unemployment compensation benefits to the claimants herein would interfere with the national policy of Federal Labor Law of encouraging self organization and collective bargaining without state interference in the use of economic weapons available to both labor and management, including the policies enunciated in 29 USC §§157-158, in contravention of the Supremacy Clause of Article VI of the Constitution of the United States. (R. 174).

On October 25, 1974, the New Mexico District Court entered its judgment denying unemployment compensation benefits

to the claimants. Thereafter on November 8, 1974, the Employment Security Commission of New Mexico filed a Notice of Appeal to the Supreme Court of the State of New Mexico from the judgment of the district court. (R. 176-178).

As Point III of its brief in chief before the Supreme Court of the State of New Mexico, the Employment Security Commission of New Mexico stated the following proposition:

Payment of unemployment compensation benefits to claimants whose unemployment is due to a labor dispute raises no constitutional conflict with federal labor policy under the supremacy clause of Article VI of the United States Constitution. (Appellant's Brief in Chief at 11-12).

Point II of the answer brief of the Appellants herein filed with the Supreme Court of New Mexico consisted of the following assertion:

Payment of unemployment compensation benefits to claimants conflicts with federal labor policy and is therefore unconstitutional under the Supremacy Clause of Article VI of the United States Constitution. (Appellees' Answer Brief, at 22-28).

In its decision in this case, the Supreme Court of the State of New Mexico did not discuss the basis for its reversal, other than by incorporating its decision in *Albuquerque-Phoenix Express, Inc. v. Employment Security Commission*, N.M. , 544, P.2d 1161 (1975) (Appendix, *infra* at pp. 4a-20a). By footnote in its *Albuquerque-Phoenix Express* decision the New Mexico Supreme Court stated:

We note the recent case of *Hawaiian Tel. Co. v. State of Hawaii Dept. of L. & I. Rel.*, F.Supp. (D. Hawaii 1975), wherein the Federal District Court

of Hawaii declared that the State of Hawaii's interpretation and application of the "stoppage of work" clause in its Unemployment Compensation Act so impermissibly alters the relative economic strength of union versus employer in their bargaining relationship as to thereby encroach upon the field preempted by the National Labor Relations Act in violation of the supremacy clause of the U. S. Constitution. We do not find this decision persuasive because it totally overlooks the fact that in order to qualify for unemployment compensation a striker must be available for, and actively seeking work. . . . N.M. at , 544 P.2d at 1165, n.1. (Appendix, *infra* at p. 11a, n.1).

Appellants herein again raised the constitutional issue in their timely Petition for Rehearing, which was denied by the Supreme Court of New Mexico on January 15, 1975. (Appendix, *infra* at p. 21a).

FEDERAL QUESTIONS RAISED ARE SUBSTANTIAL

This case raises fundamental questions concerning the extent and application of the doctrine of federal preemption as developed by this Court in the area of national labor policy. Particularly, it involves the application of the pre-emption doctrine to the payment of public assistance benefits to strikers under the provisions of state law.

Since the decision of this Court in 1959 in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), it has been clear that the states are preempted by the Supremacy Clause of Article VI of the United States Constitution from interfering with activities arguably either protected or prohibited by §§7 and 8 of the National Labor Relations Act, 29 U.S.C. §§157 and 158. E.g., *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *Teamsters Local 29 v. Morton*, 377 U.S. 252 (1964). Where the issue involved, as here,

arises out of activities neither arguably protected nor proscribed by §§7 and 8 of the National Labor Relations Act, the activity may still be preempted. The question then becomes one of determining whether the activity in question disturbs the balance struck by Congress between the conflicting interests of the employees, employers, unions and the community in a labor dispute. *See, e.g., Teamsters Local 20 v. Morton, supra.*

The rationale of *Garmen* and its progeny is well stated by Archibald Cox in an article in the *Harvard Law Review*:

An appreciation of the true character of the national labor policy expressed in the NLRA and LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests.

Two fundamental ideas lie at the core of the national labor policy: (1) freedom of employee self-organization; and (2) the voluntary private adjustment of conflicts of interest over wages, hours, and other conditions of employment through the negotiation and administration of collective bargaining agreements. Both may involve resort to strikes, boycotts, lockouts, and other economic pressures. Providing a legal framework for self-organization and collective bargaining involves determining not only how far the conduct of employers and unions should be regulated but also how far they should be free. . . . On every point . . . , formulating the national labor policy requires balancing the various interests of management, union, employees, and the public in deciding which tactics should be prohibited and which should be allowed.

Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352-53 (1972).

This Court has not heretofore decided a case in which it has defined the perimeters of Congressional concern for the payment by state governments of public assistance benefits to strikers. The question was considered by this Court in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974) in the context of the payment of state welfare benefits to strikers; however, the issue was not decided, as the case was remanded on another issue. Nonetheless, in his opinion for the Court, Mr. Justice Blackmun clearly noted the substantiality of the federal questions raised in that case, and this, by his observation that:

The New Jersey governmental action rests not on the distant contingencies of another strike and the discretionary act of an official. Rather, New Jersey has declared positively that able-bodied striking workers who are engaged, individually and collectively, in an economic dispute with their employer are eligible for economic benefits. This policy is fixed and definite. It is not contingent upon executive discretion. Employees know that if they go out on strike, public funds are available. The petitioners' claim is that this eligibility affects the collective bargaining relationship, both in the context of a live labor dispute when a collective-bargaining agreement is in process of formulation, and in the ongoing collective relationship, so that the economic balance between labor and management, carefully formulated and preserved by Congress in the federal labor statutes, is altered by the State's beneficent policy toward strikers. *It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract.* The question, of course, is whether

Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes. In this sense petitioners allege a colorable claim of injury from an extant and fixed policy directive of the State of New Jersey. That claim deserves a hearing.

416 U.S. at 123-124 (footnotes omitted and principal emphasis added).

The pervasive effect of payment of public benefits, and specifically unemployment compensation, to strikers and its frustration of the national labor policy is detailed in an exhaustive study prepared by the Industrial Research Unit of the Wharton School of Business at the University of Pennsylvania. The study concludes:

Although the evidence . . . indicates that it is probably unlikely that many persons go on strike in order to receive welfare benefits, it must nevertheless be concluded that one of the effects of the availability of public support for strikers on strikes themselves is to increase the propensity of unions to undertake strikes, and to increase the probability that they will be longer, costlier, or both. If union officials know that the public, rather than the union treasury, will be responsible for the economic security of their members while on strike, and if such public benefits preclude a political reaction of union members and their wives against the economic losses stemming from a strike, then obviously strikes can be undertaken more lightly.

* * *

How much in additional sums have been or will be added to wage settlements (and prices) because management regards it futile to risk a strike where strikers are supported by government funds is of course impossible to estimate. When strikes are supported by welfare, food stamps, unemployment compensation, or some combination of these benefits, it does seem quite

clear that the strike cannot effectively, in Dr. George W. Taylor's words, 'serve as the motive power which induces a modification of extreme positions and then a meeting of minds.' Rather, the union is put close to the position where 'there is everything to gain and nothing to lose by trying to get one's unusual demands approved without cost.'

A. Thieblot, Jr. and R. Cowin, *Welfare and Strikes, the Use of Public Funds to Support Strikes*, 217-18 (1972) (footnotes omitted).

Thus far the question of the validity of payment of public assistance to strikers under Article VI of the Constitution of the United States has been specifically passed upon in reported decisions by only two courts, other than the Supreme Court of New Mexico — the First Circuit Court of Appeals in *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir. 1973), cert. denied, 414 U.S. 858 (1973) and *ITT Lamp Division v. Minter*, 435 F.2d 989 (1st Cir. 1970), cert. denied, 402 U.S. 933 (1971), and the United States District Court for the District of Hawaii in *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F.Supp. 275 (D. Hawaii 1975).

In none of these decisions did the court condone the payment of public assistance benefits to strikers, and in the *Hawaiian Telephone* case the District Court specifically held that to do so would contravene the Supremacy Clause of Article VI of the United States Constitution. However, the approaches adopted by the two courts in considering the application of the preemption doctrine differ widely. The First Circuit has opted to analyze the issue in terms of a balancing of state versus federal interest and in the *Grinnell* and *ITT* cases required the employer to produce evidence of specific injury to sustain a constitutional challenge to the payment of benefits. The Federal District Court of Hawaii,

on the other hand, in *Hawaiian Telephone* defined the problem in application of the preemption doctrine not in terms of balancing the interests of the state and federal government but rather as one of determining the outer limits of Congressional concern. The court concluded that payment of state unemployment compensation benefits to strikers is unconstitutional on its face.

Indeed, perhaps the most compelling reason for this Court to consider and decide the issues raised by this appeal is to provide a definitive resolution to the conflict among the lower courts regarding application of the preemption doctrine in cases where, as here, there is no direct conflict between federal and state legislation. It is of utmost importance in order to avoid further confounding among the lower courts in the wake of this Court's decision in *Super Tire* that guidance be given as to whether in application of the preemption doctrine the courts should "balance" federal and state interests underpinning the two statutes or whether the inquiry should be limited to determining whether there is a conflict between the statutes. The confusion generated by *Super Tire* in this regard is illustrated by the opinion of the district court in *Hawaiian Telephone*. Initially, the opinion refers to an evidentiary hearing "mandated" by *Super Tire*. 405 F.Supp. at 277. However, the district court then questions whether such a hearing is necessary in light of the language of Mr. Justice Blackmun in *Super Tire*, quoted *supra* at pages 11-12, which would seem to eliminate the necessity of a showing of a specific impact. 405 F.Supp. at 277. The district court finally concludes that such a hearing would nevertheless "be of assistance in the ultimate resolution of the problem before this court". 405 F.Supp. at 277.

Because the issue of the payment of unemployment

compensation by states to strikers directly and forcefully affects the operation of national labor policy as developed by Congress and the federal courts it raises a substantial federal question. The validity of such payments under the Supremacy Clause of Article VI of the Constitution of the United States and the analytical approach to be followed in application of the preemption doctrine to state aid to concerted activity in labor disputes should be considered and decided by this Court. The materiality and timeliness of the issue raised by this appeal was underscored in the 1972 Report of the Committee on State Labor Law of the American Bar Association, as follows:

The recent studies, along with the increased amount of litigation and the interest of numerous states in seeking a solution to this issue, suggest a need for some action. The present confusion on this issue has resulted in strikers being granted or denied public assistance on the basis of a particular state's interpretation of national labor policy or the state's interpretation of federal and state welfare legislation. It is doubtful whether the confusion on this issue will lessen in the year ahead and it would therefore be preferable to have the issue resolved on a uniform basis rather than perpetuate the current confusion.

A.B.A. Sec. of Lab. Law, 1972 Committee Repts., p. 301 (footnotes omitted).

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully Submitted,

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Dated: April 6, 1976.

APPENDIX

Names of All Individual Claimants

Kimbell, Inc., d/b/a Foodway

Lana Jean Nolan, Lucille Virginia Collins, Danie B. Clingman, Susie Padilla, Clyde R. Duncan, Dorothy L. Gray, Earl W. M. Speis, Dorothy J. Schwach, Jimmy M. Carroll, John Davis, John G. Lucero, Rudolfo Garrillo, Charlie A. Ortega, Beatrice Lopez, Bernal Sanchez, Pola S. Pacheco, Eloy L. Gilbert, Joe C. Chavez, Ruby Sweeney, Frieda V. Rael, Lorraine D. Billings, Dolores A. Vigil, Theresa Saavedra, Dorma Jean Trusty, Pete Aranda, Rosable Griego, Benito R. Baca, Robert P. Chavez, Michael D. Flores, Richard A. Mares, Delubino Jr. Romero, Robert E. Padilla, Agnes Olguin, Joe L. Apodaca, Imogen H. Holiday, Margaret Helen Roach, Ina B. Beck, Wayne Lee Johnson, Kathleen Burke, Judith S. Wiles, Victor Padilla, Jeanne D. Kohlman

Furr's, Inc.

John M. Cosentino, Arthur L. Bingaman, Bate R. Grise, Louise M. Logan, Willie M. Whitten, Mary M. Noble, Lawrence O. Saul, Frances K. Montoya, Finnimore M. Sanchez, Yoko S. Downey, Joy Barnett, John Carl Wright, Bill D. Cawthon, Bea M. Buffenmeyer, Edna I. Kotschwar, Benny Romero, Jake Aragon, Mary C. Puckett, Thelma Montoya, Aurora D. Baldonado, Admundo C. Bernal, Adolfo J. Trujillo, Paul Pacheco, Jr., Eloy Romero, Fred C. Sandoval, Patricia L. Mutchie, Tommy Torres, Betty A. Thornton, Bee Woodward, Rose J. Lovato, Narciso C. Quintana, Des W. Beevers, Gary J. Miller, David A. Johnson, Charles D. Whitmore, Larry L. Williams, Corine Ortega, Cornalio Padilla, Dolores S. Hemsing, Richard Moore, Armando Gandara, Ronnie Morga, Richard C. Clifton, Jr., James M. Coffman, Sandra Ortiz, Linda E. Snider, Eddie P. Varela, Timothy L. Sandoval, Danny Gutierrez, Sandra L. Seaborn, Jane Elizabeth Cast, Richard J. Mahboub, Jr., Barbara A. Chavez, Phyllis Ann Abel

Safeway Stores, Inc.

Stanley S. Skibitski, Ruby G. Burkhardt, Samuel G. Tolley, Clarence P. Dunn, Jack D. Wise, Nancy Shama, John S. Mickler, Delmer Eugene Clem, Horace W. Jones, Carlton R. Burkhardt, Sybil D. Webb, Donna Odell Hatfield, James C. Foster, Michael Shreve, Robert J. Weinheimer, Kathleen G. Romero, Harry J. Welesky, Ruth D. Perea, Donila D. Gallegos, Frank Aranda Griego, Raymond Plunkett, Julian Ortiz, Eyrel A. Moore, Julian Smith, Joseph W. Garcia, John T. Evans, Fidel S. Lopez, Mary Louise Karns, Joe L. Gomez, Tillie Apodaca, Wilma L. Jones, Jimmy Pacheco, Charlie J. Torres, Estella G. Barros, Lillian M. Dennis, Nellie Montoya, Albert M. Gonzales, Pablo O. Lopez, Stella Sanchez, Vincentita Lujan, Maria G. Maes, Christa Dora Sanchez, Ruby E. Wormington, Dovie C. Brown, Minfa O. Sanchez, Samuel Jaramillo, Fred E. Chavez, Manuel D. Luncero, Amadeo Sandoval, Al E. Copeland, Antonio A. Villanueva, Eloy Jaime, Horacio E. Martinez, Fred Montoya, John A. Gerhardt, Robert M. Torres, James C. Chavez, Anthony Cano, Ray E. Luna, Oliver J. Schaffer, Freddy A. Salazar, Jack L. Archer, Frank B. Gurule, Gerald L. Speis, Robert B. Haislip, Donna L. Grubb, Mary Archuleta, Joe A. Arias, Harry Valdez, Maryann S. Sprouse, Perfecto Z. Sanchez, Bunn Hern III, Jose F. R. Maestas, Nancy R. Romero, Virginia A. Lovato, Billy Roybal, Robert Sierra, Billy E. Quintana, Alfonso G. Chavez, Ralph A. Montano, Debbi Ann Alires, Felix Russell Lopez, Andre F. Chene, Tony J. Kozlowski

Shop Rite Foods, Inc., d/b/a Piggly Wiggly

Janet Gail Davis, Donald K. Kelley, Tamsye M. Romero, James A. Etherington, Richard N. Schultz, Thomas C. Campbell, Betty Lou Reed, Richard R. Tafoya, Raymond C. Gallegos, Boni Baca, Jose A. Navarro, Randy R. Carter, James H. Ingram, Louis E. Saavedra, Fred C. Encinias, Benny A. Romero, Roger Urioste, Patricia L. Lawson

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Monday, December 29, 1975

NO. 10323

KIMBELL, INC., d/b/a FOODWAY,
et al.,

Petitioners-Appellees,

vs. Bernalillo County

EMPLOYMENT SECURITY COMMISSION
OF NEW MEXICO,

Respondent-Appellant,

and

LANA JEAN NOLAN, et al.,
Respondent-Claimant
Employees-Appellants.

APPEAL FROM DISTRICT COURT
BERNALILLO COUNTY

DECISION

On the basis of the Court's opinion in Albuquerque-Phoenix Express vs. Employment Security Commission (No. 10247, Opinion filed December 24, 1975), the Judgment of the District Court of the Second Judicial District is reversed.

IT IS SO ORDERED.

John B. McManus, Jr., Chief Justice
Samuel Z. Montoya, Justice
Dan Sosa, Jr., Justice

WE DISSENT:

LaFel E. Oman, Justice
Donnan Stephenson, Justice

Filed: December 24, 1975

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

ALBUQUERQUE-PHOENIX EXPRESS, INC.,
Petitioner-Appellant,

vs.

No. 10,247

EMPLOYMENT SECURITY COMMISSION
OF NEW MEXICO,
Respondent-Appellee,
and

ROBERT R. BURGESS, et al.,
Claimants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY

FOWLIE, Judge

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OPINION

McMANUS, Chief Justice.

This matter was brought in the District Court of Bernalillo County for review upon certiorari of a decision of the

Employment Security Commission (Commission) that certain claimants for unemployment compensation benefits, employees of Albuquerque-Phoenix Express, Inc., petitioner-appellant (Company), who were unemployed as a result of a labor dispute were eligible to receive unemployment benefits. This matter was presented to the court upon briefs and oral argument. From a judgment of the district court dismissing the Company's appeal and affirming the judgment of the Commission, the Company appeals to this Court.

After receiving the decision of the court adverse to it, the Company, by this appeal requests review of the following points:

1. Claimants were not available for work nor were they actively seeking work as required by § 59-9-4(A)(3), N.M.S.A. 1953 Comp.
2. Claimants were disqualified under § 59-9-5(a), N.M.S.A. 1953 Comp., as they left work voluntarily without good cause.
3. The employees should have been disqualified under § 59-9-5(d), N.M.S.A. 1953 Comp., as there was a "stoppage of work" at the Company's premises.
4. Even if "stoppage of work" is defined as a substantial curtailment of the employer's business, such a curtailment did occur.

The first issue raised concerns § 59-9-4(A)(3), *supra*, which provides, in part, as follows:

"A. An unemployed individual shall be eligible to receive benefits with respect to any week *only* if he:
* * * *

"(3) is able to work and is *available for work* and is *actively seeking work*; * * * * (Emphasis added.)

The Appeals Tribunal for the Commission and the Commission itself, which adopted the ruling of the Appeals Tribunal, determined that twelve of the seventeen claimants were available for and actively seeking work. On this issue, the finding of the Appeals Tribunal, being representative of each of the twelve claimants, read in relevant part, as follows:

"The claimant was required to register for work with the New Mexico State Employment Service as a prerequisite to filing for unemployment benefits. The claimant also sought work through the union ([Teamsters] Local 492), which maintains an out-of-work list and a hiring hall. During several weeks while filing continued claims, he was successful in obtaining temporary work through the union. During about seven of these weeks, he earned more than his weekly benefit amount (\$56.00). The evidence shows that the claimant was available for full-time work had such been offered to him."

The Commission and the court below adopted this finding and we conclude that there was substantial evidence to support such a finding.

The employer seeks to have us interpret the availability and active search for work provisions of § 59-9-4(A)(3), supra, as establishing an absolute standard of availability for permanent new work with no limitations or restrictions of any kind, regardless of the circumstances prevailing in particular cases. Applying this standard to persons whose unemployment results from a labor dispute and holding them unavailable because they will not immediately return to their jobs with the employer with whom they are disputing or will not sever their employment relationship with that employer and seek permanent new work, would in all cases make such persons ineligible and render the labor dispute disqualification provisions of § 59-9-5(d), N.M.S.A. 1953 Comp., totally superfluous. (That section will be discussed in more detail in our consideration of "stoppage of work.")

On the basis of individual interviews with each claimant by Commission personnel, written documents and other reports in each claimant's file, and the record before the Commission's Appeals Tribunal, where all parties were represented, the Commission found that the claimants were available for and actively seeking work as required by § 59-9-4(A)(3), supra. The Commission further found that a number of claimants had obtained temporary intervening work, and that picket line duty was not mandatory and did not interfere with the claimants' search for or acceptance of work.

It seems obvious that the claimants herein were already employed by the Company. They expected only a temporary unemployment period and, therefore, could be available only for temporary intervening work. It would not make much sense for the Commission to demand that they, in fact, quit their jobs and really join the ranks of the unemployed, or that they abandon their legal rights and economic interest in the labor dispute and return to their jobs with the employer with whom they were disputing on the premise that their dispute was without merit.

In fact, § 59-9-5(e)(2), N.M.S.A. 1953 Comp., expressly provides:

"Notwithstanding any other provisions of this act [59-9-1 to 59-9-29], no work shall be deemed suitable and benefits shall not be denied under this act to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; * * *."

Another point for review concerns whether or not claimants left work voluntarily without good cause. The Commission held inapplicable, in the case of labor disputes such as we find here, the voluntary leaving provision of § 59-9-5(a), N.M.S.A. 1953 Comp., reading:

"An individual shall be disqualified for benefits—

"(a) For the week in which he has left work voluntarily without good cause, if so found by the commission, and for not less than one (1) nor more than thirteen (13) consecutive weeks of unemployment which immediately follow such week (in addition to the waiting period) as determined by the commission according to circumstances in each case, and such individual's total benefit amount shall be reduced in a sum equal to the number of weeks of disqualification multiplied by his weekly benefit amount."

In *Inter-Island Resorts, Ltd. v. Akahane*, 46 Haw. 140, 156-58, 377 P.2d 715, 724-25 (1962), the Supreme Court of Hawaii analyzed a provision in the Hawaii Employment Security Law quite similar to our provision, § 59-9-5(a), supra, in the following way:

"This argument [that claimants unemployed as the result of a labor dispute should be disqualified under the voluntary leaving provisions of the unemployment compensation law] is in direct conflict with the generally accepted interpretation of the voluntary leaving and the labor dispute disqualification provisions of the various state laws. The consensus supports the conclusion that the two disqualification provisions are mutually exclusive and that an individual whose unemployment is due to a 'stoppage of work' which exists because of a 'labor dispute' cannot be said to have 'left his work voluntarily' within the meaning of the voluntary separation provision. *T. R. Miller Mill Co. v. Johns*, 261 Ala. 615, 75 So.2d 675; *Intertown Corp. v. Appeal Board of Mich. Unemployment Comp. Comm.*, supra, 328 Mich. 363, 43 N.W.2d 888; *Little Rock Furniture Mfg. Co. v. Commissioner of Labor*, 227 Ark. 288, 298 S.W.2d 56; *Marathon Electric Mfg. Corp. v. Industrial Comm.*, 269 Wis. 394, 69 N.W.2d 573, 70 N.W.2d 576; *Lesser, Labor Dispute and Unemployment Compensation*, 55 Yale Law Journal 167.

"It is one of the fundamental tenets of the unemployment compensation law that the administering

agency remain neutral in the labor dispute and refrain from passing on the merits of the dispute. Courts almost unanimously hold that the merits of a labor dispute are immaterial in determining the existence of the dispute, the rationale being that the unemployment compensation fund should not be used for the purpose of financing a labor dispute any more than it should be withheld for the purpose of enabling an employer to break a strike. *Sakrison v. Pierce*, *supra*, 66 Ariz. 162, 185 P.2d 528; *In re Steelman*, *supra*, 219 N.C. 306, 13 S.E.2d 544; *Amory Worsted Mills, Inc. v. Riley*, 96 N.H. 162, 71 A.2d 788; *W. R. Grace & Co. v. California Employment Comm.*, 24 Cal.2d 720, 151 P.2d 215; *Byerly v. Unemployment Comp. Board of Review*, 171 Pa. Super. 303, 90 A.2d 322; *Lawrence Baking Co. v. Michigan Unemployment Comp. Comm.*, *supra* 308 Mich. 198, 13 N.W.2d 260; *T. R. Miller Mill Co. v. Johns*, *supra*, 261 Ala. 615, 75 So.2d 675.

* * *

"Moreover, the terms 'leaving work' or 'left his work' as used in unemployment compensation laws refer only to a severance of the employment relation and do not include a temporary interruption in the performance of services. *Kempfer, Disqualification for Voluntary Leaving and Misconduct*, 55 Yale Law Journal 147, 154. Absence from the job is not a leaving of work where the worker intends merely a temporary interruption in the employment and not a severance of the employment relation. Such is the case of strikers who have temporarily interrupted their employment because of a labor dispute. Under the prevailing view, they have not been deemed to have terminated the employment relationship and the voluntary leaving disqualification has no application to them. *T. R. Miller Mill Co. v. Johns*, *supra*, 261 Ala. 615, 75 So.2d 675; *Mark Hopkins, Inc. v. California Employment Comm.*, 24 Cal.2d 744, 151 P.2d 229, 154 A.L.R. 1081; *Knight-Morley Corp. v. Michigan Employment Security Comm.*, 352 Mich. 331, 89 N.W.2d 541; *Marathon Electric Mfg. Corp. v. Indus-*

trial Comm., *supra*, 269 Wis. 394, 69 N.W.2d 573, 70 N.W.2d 576."

We fully adopt this reasoning.

The third point upon which appellants rely is that the employees should have been disqualified for unemployment compensation benefits under § 59-9-5(d), N.M.S.A. 1953 Comp., which provides, in part, that:

"An individual shall be disqualified for benefits * * *

"(d) For any week with respect to which the commission finds that his unemployment is due to a *stoppage of work* which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed; Provided, that this subsection shall not apply if it is shown to the satisfaction of the commission that—

"(1) He is not participating in or directly interested in the labor dispute which caused the *stoppage of work*; and

"(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the *stoppage*, there were members employed at the premises at which the *stoppage* occurs, any of whom are participating in or directly interested in the dispute; * * *. (Emphasis added.)

The appellants claim that the term "stoppage of work" refers to the individual efforts of the employee, while the appellees argue that "stoppage of work" refers to a cessation or substantial curtailment of the employer's business. We are thus called upon to interpret this term.

We are not the first state supreme court to be confronted with this question. All fifty states have adopted unemployment compensation laws, and a majority of them have a provision disqualifying employees from benefits if the "unemployment is due to a stoppage of work which

exists because of a labor dispute * * *." Shadur, Unemployment Benefits and the "Labor Dispute" Disqualification, 17 U. Chi. L. Rev. 294 (1950); Lewis, The "Stoppage of Work" Concept in Labor Dispute Disqualification Jurisprudence, 45 J. Urban L. 319 (1967); Annot., 61 A.L.R.3d 693 (1975). About twenty of the states have interpreted the term "stoppage of work" to mean a cessation or a substantial curtailment of the employer's business, while only one — Oklahoma — has interpreted the term to mean a stoppage of the individual work of the employee. Annot., 61 A.L.R.3d 693 (1975). We agree with the majority of states and conclude that the term "stoppage of work," as it is used in the context of our Unemployment Compensation Act, refers to the employer's business rather than the employee's work.¹

The term "stoppage of work" was originally taken from "Draft Bills" prepared by the Committee on Economic Security, which in turn borrowed the phrase from British Unemployment Insurance Acts. Shadur, Unemployment Benefits and the "Labor Dispute" Disqualification, *supra*. Therefore, it is significant to note that:

"When this country's fifty-one statutes were adopted, the phrase had long since acquired a settled construction from the British Umpires as referring 'not to the cessation of the workman's labour, but to a stoppage of the work carried on in the factory, workshop or other premises at which the workman is employed.'"

Id. at 308.

Were the phrase "stoppage of work" to refer to the employee's work, it would be redundant in the sentence "his

¹We note the recent case of Hawaiian Tel. Co. v. State of Hawaii Dept. of L. and I. Rel., ___ F.Supp. ___, (D. Hawaii 1975), wherein the Federal District Court of Hawaii declared that the State of Hawaii's interpretation and application of the "stoppage" of work clause in its Unemployment Compensation Act so impermissibly alters the relative economic strength of union versus employer in their bargaining relationship as to thereby encroach upon the field preempted by the National Labor Relations Act in violation of the supremacy clause of the U.S. Constitution. We do not find this decision persuasive because it totally overlooks the fact that in order to qualify for unemployment compensation a striker must be available for, and actively seeking work.

unemployment is due to a stoppage of work which exists because of a labor dispute ***." If the statute read "his unemployment is due to a labor dispute," or "he stopped working because of a labor dispute," then it would be clear that the legislature intended to disqualify from receiving benefits all those employees who stop work because of a labor dispute, no matter how minimal the impact of their stopping is on the employer's operations.

Furthermore, the sentence "He is not participating in or directly interested in the labor dispute which caused the stoppage of work ***" would be an extremely clumsy way of phrasing the idea, if "stoppage of work" referred to the employee's individual work. In fact, if we interpreted "stoppage of work" in this way, the whole of section (d) would read awkwardly at best. Therefore, a common sense approach to the words in their context leads us to the same conclusion that nearly all other courts have reached — that "stoppage of work" refers to the employer's business.

Finally, it must be stressed that our role in this situation is not to usurp the legislative function. As the Supreme Court of Arizona aptly pointed out in *Sakrison v. Pierce*, 66 Ariz. 162, 165-66, 185 P.2d 528, 530-31 (1947):

"*** Much is made in counsel's briefs of policy considerations. For example, on the one hand lies the charge that to allow compensation in such a case as this would be, in effect, to force employers and the state to finance a strike. On the other hand, it is claimed that to deny it would be to deny aid to those whom, among others, the Act was designed to protect (i.e., those who had participated in a labor dispute and lost — at least to the extent that others now had their jobs and their former employer's operations had been fully resumed). And that finally, a denial of compensation would seriously cripple their unquestioned right to strike. At the outset it should be made clear that this court is not concerned with any questions relative to the merits of the labor controversy itself. Our decision is not and cannot

be determined by such factors. Instead it is determined by the choice that the elected legislative representatives of the people of this state have made for us. And whether or not the Act should compensate employees in this position is properly a choice for the legislature. *** The function of this court, then, is simply to point out which route our legislature has chosen to travel."

Having then concluded that "stoppage of work" means a cessation or substantial curtailment of the employer's business, we are next confronted with the question of whether the employer's business was substantially curtailed at any time during the period from July 20, 1970 until November 30, 1970 when these workers went out on strike. What constitutes a substantial curtailment of work or operations at the employing establishment has generally been regarded by the courts as a question dependent upon the facts and circumstances of each case. Annot., 61 A.L.R.3d 693, 705 (1975). We agree.

The district court determined that the Commission's findings were supported by substantial evidence in the record as a whole, and accordingly adopted and entered the following findings of fact, among others, just as they had appeared in the Commission's decision of August 9, 1971:

"7. Members of Teamster's Local No. 492 who struck the employer's place of business comprised about twenty percent of the employer's total work force.

"8. Immediately after commencement of the strike, the employer began hiring replacements for the striking employees and had replaced as many as necessary to continue normal operations within a few days.

"9. With the exception of some impact on the employer's interline freight business, there was no cessation of normal business activity or curtailment of the work force or productivity at the employer's place of business or establishment during the labor dispute."

The appellant challenges findings 8 and 9 and argues that the labor dispute did cause a substantial curtailment of the employer's business, thereby permitting the labor dispute disqualification provision, § 59-9-5(d), supra, to apply to the claimants here involved. In support of this challenge, appellant refers us to two letters from the attorney for the Company sent to the Commission in which certain unsubstantiated and unsupported figures relating to the curtailment of the Company's business are contained.

In contradistinction to these unverified figures we have the sworn testimony of Duncan A. McLeod, president of the Company, from the transcript of the hearings before the Commission on November 16, 1970. On direct examination, he testified as follows:

"Q Wasn't there any cessation of productive activity at your place of business resulting from this strike at any time?

"A No, not necessarily. We got back and it was operating.

"Q Well, when all these men who are employed, who apparently were employed by you prior to July 20th, who left their work, didn't that interfere with your production at all?

"A Oh, we were a little slow for a few days."

Appellant also refers us to certain pages in the supplemental transcript of record, but we have yet to find any evidence there which casts any doubt upon the accuracy of the district court's findings.

In short, the appellant has failed to demonstrate to us that there is any reason to reject the findings of the Commission and the district court with regard to the impact that the labor dispute had on the employer's business. There was substantial evidence to support the district court's find-

ings 7, 8 and 9, and we conclude that the employer's business did not suffer any substantial curtailment when the employees involved here walked off their jobs.

The judgment of the trial court will be affirmed.

IT IS SO ORDERED.

John B. McManus, Jr.,
Chief Justice

WE CONCUR:

Samuel Z. Montoya, J.
Dan Sosa, Jr., J.

OMAN and STEPHENSON, JJ, dissenting.

STEPHENSON, J. (dissenting)

I am unable to agree with the construction placed by the majority upon the Labor Dispute Disqualification section of the New Mexico Unemployment Compensation Law, § 59-9-5(d), N.M.S.A. 1953. The construction of that statute which I believe to be correct would require a decision for the company without reaching the other issues dealt with by the majority. I will accordingly confine my comments to that issue.

The court below found that the claimants were employees of the company and members of a labor union. Failing to reach a mutually satisfactory collective bargaining agreement with the company on economic issues, the union and the employees struck the company's place of business. All of the claimants participated in the strike. Union members who struck the company comprised about twenty percent of the company's total work force. However, under the construction I would place upon the cited statute, this fact is irrelevant.

The Commission contends that "stoppage of work," as that term is used in § 59-9-5(d), refers not to the claimant's work, but to a stoppage or curtailment of the employer's operation. The question is one of first impression in this state. The majority has opted for the Commission's interpretation, but in my opinion the phrase refers to a cessation of work by the employees as a result of a labor dispute, viz. a strike.

I would concede that the statute is awkwardly worded. By parsing the sentence in differing ways and substituting words for phrases, proponents of the two contending theories can endlessly argue that the theory which they espouse is the more reasonable, as the parties have done in their briefs. For example, one could point out that in § 59-9-5 the word "work" is used in each subsection. In the earlier ones the word clearly refers to the employee, and it would be anomalous to apply a different meaning to the work in subsection (d). I eschew this argument as the basis for my opinion, although I agree with the reasoning of the majority in *Board of Review v. Mid-Continent Petroleum Corp.*, 193 Okla. 36, 141 P.2d 69 (1943). I do not think the statute, however inartfully worded, is that opaque.

I premise my opinion on rather simple and well-settled rules of statutory construction and grammar. This court in its opinion in *In re Goldsworthy's Estate*, 45 N.M. 406, 115 P.2d 267 (1941), quoting from Sutherland on Statutory Construction § 408 (2 ed. 1904), said:

"Statutes as well as other writings are to be read and understood primarily according to their grammatical sense, unless it is apparent that the author intended something different. In other words, it is presumed that the writer intended to be understood according to the grammatical purport of the language he has employed to express his meaning."

The court then proceeded to define the doctrine of the last antecedent by quoting from 59 C.J. Statutes § 583 (1932) as follows:

"By what is known as the doctrine of the 'last antecedent,' relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote."

See also *Hughes v. Samedan Oil Corporation*, 166 F.2d 871 (10th Cir. 1948). Applying these rules to the statute before us, we observe that a "labor dispute" and not a "stoppage of work" must exist at the factory, establishment or other premises.

I agree with the reasoning of the special concurring opinion of Justice Davison in *Board of Review v. Mid-Continent Petroleum Corp.*, supra. Justice Davison stated the definition of the last antecedent rule, quoting from a prior Oklahoma case, to be:

"A limiting clause in a statute is generally to be restrained to the last antecedent, unless the subject matter requires a different construction."

Certainly there is nothing about the subject matter here which requires a different construction. He then continued:

The last antecedent in the statute before us is the "labor dispute," not the "stoppage of work."

A labor dispute may exist at the factory without a "shutdown." Of course, if a labor dispute does result in a shutdown or stoppage of operations at the plant or factory it may result in a stoppage of work for individuals not involved in the labor dispute. Individuals not so involved are the subject of consideration by the legislature in the statutory provisions immediately succeeding the above-quoted language.

It is thus my opinion that the thing which must exist at the factory is, under the terms of the statute, the labor dispute, not the stoppage of work; that when the

labor dispute exists at the factory resulting in a stoppage of work by the individual he is disqualified to receive benefits if he is a participant in the labor dispute and not working by reason of his own voluntary desire, regardless of whether the factory stops or does not stop operating.

My opinion is bolstered by other considerations, though I reach the above conclusion without their aid. I note the statement of policy which the Legislature included in the Act in § 59-9-2 N.M.S.A. 1953.¹ I cannot read the phrase "through no fault of their own" as meaning or implying evil or wrongdoing or that an employee's work stoppage was subject to censure. *Board of Review v. Mid-Continent Petroleum Corp.*, *supra*. In ordinary parlance it would mean unemployment due to the employee's own volition or at his decision or election. Considering the phrase in § 59-9-2 in that light, it is clear to me that the very purpose of the Act is to provide compensation for those who are involuntarily unemployed. That certainly does not include strikers.

As the majority has pointed out, the conclusion that they have reached is supported by a majority of cases which have passed upon the issue. Most of these cases trace their way back to *Lawrence Banking Co. v. Michigan Unemployment C. Com'n*, 308 Mich. 198, 13 N.W.2d 260 (1944). That case appears to rely heavily on the English National Insur-

¹"Declaration of state public policy. As a guide to interpretation and application of this act [59-9-1 to 59-9-29], the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. *Involuntary unemployment* is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state requires the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own". (Emphasis added.)

ancee Act of 1911 and on cases construing it. Bearing in mind that we are now in the year 1976 and that the issue presented is one of first impression in New Mexico, no reason has been suggested to me as to why we should now adopt a construction placed upon a statute of a foreign country by authorities charged with its administration not long after the turn of the century. In fact I am not at all sure why the Michigan court in *Lawrence Baking Co.* even addressed the problem which confronts us. The claimants there were not at any material time unemployed because of a labor dispute so far as I can determine from the opinion. To the contrary, they were unemployed because they had been discharged and replaced by others. The strike for all practical purposes, only lasted about fifteen minutes. I further observe that two strong dissents were filed in *Lawrence Baking Co.* with which I generally agree.

Much is said in the briefs about whether or not a governmental policy of neutrality exists in relation to strikes, a subject touched upon by the majority in its discussion of *Sakrison v. Pierce*, 66 Ariz. 162, 185 P.2d 528 (1947). Since I do not predicate my opinion upon the existence or non-existence of such a policy, I express no opinion as to its existence. I will content myself with saying that if it does not exist, it should.

Still bearing in mind that we are confronted with an issue of first impression and that we are free to adopt an interpretation of the statute which now best suits our situation, I find it interesting that in more modern times several states have refused to adopt "stoppage of work" language, or have eliminated that language after state courts have allowed unemployment compensation to be paid to strikers. In New York and California "stoppage of work" language is absent and strikers are generally ineligible for benefits. For example, see Cal. U nep. Ins. § 1262 (West 1972); N.Y. Labor Law § 592 (McKinney 1965) (seven week waiting period); Colo. Rev. Stat. Ann. § 8-73-109 (1974). There are about fifteen such states. The Texas statute reads "claimant's work stoppage." Vernon's Tex. Stat. art.

5221b-3 (1971). Two cases decided in the 1950's in Arizona held that stoppage of work referred to the employer's business. *Sakrison v. Pierce*, *supra*; *Mountain States Tel. & Tel. Co. v. Sakrison*, 71 Ariz. 219, 225 P.2d 707 (1950). Soon thereafter in 1952 the Arizona Legislature deleted "stoppage of work" and disqualified those employees involved in a labor dispute. Ariz. Rev. Stat. Ann. § 23-777 (1971). Michigan also changed its statute after the courts interpreted stoppage of work as the employer's operation. *Lawrence Baking Co. v. Michigan Unemployment C. Com'n*, *supra*, and Mich. Comp. Laws Ann. § 421.29 (1967).

For the reasons stated, I respectfully dissent.

Donnan Stephenson
Justice

I CONCUR:

LaFel E. Oman, C.J.

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Thursday, January 15, 1976

NO. 10323

KIMBELL, INC., d/b/a FOODWAY,
et al.,

Petitioners-Appellees,

vs. Bernalillo County

EMPLOYMENT SECURITY COMMISSION
OF NEW MEXICO,

Respondent-Appellant,

and

LANA JEAN NOLAN, et al.,

Respondents-Claimants
Employees-Appellants.

This matter coming on for consideration by the Court upon motion of Appellees for a rehearing, and the Court having considered said motion and being sufficiently advised in the premises:

NOW, THEREFORE, IT IS ORDERED that the motion of Appellees for rehearing be and the same is hereby denied.

ATTEST: A TRUE COPY
Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico.
(SEAL)

Filed: March 24, 1976

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

KIMBELL, INC., d/b/a FOODWAY,
FURR'S, INC., ALLIED SUPER-
MARKETS, INC., d/b/a K-MART,
SAFEWAY STORES, INC., and
SHOP RITE FOODS, INC., d/b/a
PIGGLEY WIGGLEY,

Petitioners-Appellees,

v.

No. 10323

EMPLOYMENT SECURITY COMMISSION
OF NEW MEXICO,

Respondent-Appellant,

and

LANA JEAN NOLAN, et al.,

Respondent-Claimant
Employees-Appellant.

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is hereby given that Kimbell, Inc., d/b/a Foodway, Furr's, Inc., Safeway Stores, Inc., and Shop Rite Foods, Inc., d/b/a Piggley Wiggley, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico reversing judgment of the District Court of the Second Judicial District, entered in this action on December 29, 1975, and from the order of the Supreme Court of the State

of New Mexico entered January 15, 1976, denying the Motion of Appellees for a Rehearing.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

POOLE, TINNIN, DANFELSER & MARTIN

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Petitioners-Appellees

KELEHER & McLEOD

By s/John B. Tittman
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Inc., Petitioner-Appellee

This will certify that on this
22nd day of March, 1976, in
compliance with Rule 33(1) of
the Rules of the Supreme Court
of the United States, a copy of
the foregoing Notice of Appeal
was served upon the following
being all parties:

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s/Robert P. Tinnin, Jr.

MAY 12 1976

JAMES MICHAEL PODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1975
No. 75-1452

KIMBELL, INC., d/b/a FOODWAY,
FURR'S, INC., SAFEWAY STORES, INC., and
SHOP RITE FOODS, INC., d/b/a PIGGLY WIGGLY
Appellants,

vs.

EMPLOYMENT SECURITY COMMISSION
OF THE STATE OF NEW MEXICO
and
LANA JEAN NOLAN, *et al.*,
Appellees.

On Appeal From The Supreme Court Of The
State Of New Mexico

MOTION OF APPELLEE TO DISMISS APPEAL

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In the Supreme Court of the United States

October Term, 1975

No.

KIMBELL, INC., d/b/a FOODWAY,
FURR'S, INC., SAFEWAY STORES, INC., and
SHOP RITE FOODS, INC., d/b/a PIGGLY WIGGLY
Appellants,
vs.
EMPLOYMENT SECURITY COMMISSION
OF THE STATE OF NEW MEXICO
and
LANA JEAN NOLAN, *et al.*¹
Appellees.

On Appeal From The Supreme Court Of The
State Of New Mexico

MOTION OF APPELLEE TO DISMISS APPEAL

OPINIONS BELOW

The decision of the Supreme Court of the State of New Mexico is unreported but is set forth in the Appendix, *infra* at p. 3a. The decision of the Supreme Court of the State of New Mexico on Appellant's Motion for Rehearing is also unreported but is set forth in the Appendix, *infra* at p. 21a. The opinion of the Supreme Court of the State of New Mexico in *Albuquerque-Phoenix Express, Inc. v. Employment Security Commission*, which the Supreme Court for the

¹This appeal concerns unemployment compensation claims by 198 individuals employed by Appellants herein. The names of all claimants are set forth in the Appendix, *infra* pp. 1a-2a.

State of New Mexico incorporated as the basis for its decision in this case is reported at . . . N.M. . . ., 554 P.2d 1161 (1975) and is set forth in the Appendix, *infra*, at pp. 4a-20a. This statement of the OPINIONS BELOW and the referenced material set forth in the Appendix is identical to the corresponding statement and referenced material in Appellant's JURISDICTIONAL STATEMENT and is reprinted in this Motion for the convenience of the Court.

JURISDICTION

Appellee accepts the statement of JURISDICTION contained in Appellant's JURISDICTIONAL STATEMENT.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellee accepts the statement of controlling CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED contained in Appellant's JURISDICTIONAL STATEMENT.

QUESTION PRESENTED BY APPEAL

Appellee considers Appellant's presentation of the QUESTION PRESENTED BY APPEAL to be too broadly stated and would rephrase the Question as follows:

Does the grant of unemployment compensation benefits to strikers by the State of New Mexico contravene the Supremacy Clause of Article VI of the Constitution of the United States by interfering with the preemptive jurisdiction of federal labor law?

STATEMENT OF THE CASE

Appellee accepts Appellant's STATEMENT OF THE

CASE with the modification that the Supreme Court of the State of New Mexico affirmed the specific findings and conclusion set forth in the Decision of the Employment Security Commission of New Mexico, issued June 21, 1972, that in accordance with established state law precedents² the economic burden suffered by the Employer-Appellants as a result of the labor dispute were not substantial, did not significantly interfere with the employer's normal business operations throughout the duration of the labor dispute and did not amount to a "stoppage of work" at the employer's premises within the requirement of §55-9-5(d), N.M.Stat.Ann. (Supp. 1975). (R. 2-3).

Appellee Adds the Following Facts Material to the Consideration of the Question Presented.

In its history of adjudicating the applicability of the labor dispute disqualification provision of the New Mexico Unemployment Compensation Statute, the Employment Security Commission of New Mexico has awarded benefits to claimants whose unemployment was due to a labor dispute in only three cases, and only under the "stoppage of work" interpretation sustained by the Supreme Court of New Mexico in this case. (R. 63).

The labor dispute involved in this case was settled on December 4, 1971. (R. 26). No decision of the Employment Security Commission of New Mexico holding the Claimant-Appellees eligible for benefits under any provision of the Unemployment Compensation Law of New Mexico was made until after that date. (R. 5-67).

²*Inter-Island Resorts Ltd. v. Akahane*, Ha, 377 P.2d 715 (1962); *Meadow Gold Dairies of Hawaii Ltd. v. Wiig*, 50 H. 225, 437 P.2d 317 (1968); *Cumberland and Allegheny Gas Co. v. Hatcher*, 147 W.V. 630, 130 S.E.2d 115; *Ahne v. Dept. of Labor and Industrial Relations*, 53 H. 185, 489 P.2d 1397.

I

**THE QUESTION PRESENTED DOES
NOT RAISE A SUBSTANTIAL
FEDERAL QUESTION OF PREEMPTION
SUFFICIENT FOR THIS COURT TO
TAKE JURISDICTION**

The New Mexico Supreme Court, in its controlling opinion in the associated case of *Albuquerque-Phoenix Express, Inc. v. Employment Security Commission, supra*, Appendix, p. 11a, considered the federal question of pre-emption raised before this Court by Appellants and decided, based upon its interpretation of state law as applicable to the particular facts of this case, that no substantial question of interference with federal labor law policy existed, and that under its interpretation, the administration of the State unemployment compensation law did not conflict with the preemption rule set down by this Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) or *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). It is not entirely clear from the New Mexico Supreme Court's rejection of the rational expressed by the District Court in *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F. Supp. 275 (D. Hawaii 1975), whether it was deciding that, under its interpretation of the New Mexico statutes, there was no conflict between the state administration of unemployment compensation and federal labor policy as a matter of law, or whether it was adopting the balancing of state versus federal interests approach exhaustively developed by the First Circuit Court of Appeals in *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir, 1973) *cert. denied*, 414 U.S. 858 (1973). Whether the New Mexico Court meant to say that, under the particular facts of this case, the issue was exclusively one of state law interpretation and raised no colorable federal question or

that the potential interference with federal labor policy was too remote and tangential to outweigh state interest, its opinion would appear sustainable and would not, under established principle of U. S. Supreme Court review, give rise to assumption of jurisdiction by this Court.

It is important to note that, in its controlling opinion in *Albuquerque-Phoenix Express, Inc. v. Employment Security Commission, supra*, the New Mexico Supreme Court was not going beyond the facts of these two cases which, for purposes of the federal question presented on appeal to this Court, were virtually identical. Unlike the Rhode Island statute which this Court was addressing in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974), the New Mexico law, like a majority of the States' laws, does not provide for payment of benefits to strikers after a fixed period of disqualification. The general rule under New Mexico law is that claimants are disqualified from receipt of benefits for the duration of their unemployment resulting from a labor dispute which causes a substantial stoppage of work at their place of employment. As indicated in the record, the Employment Security Commission of New Mexico has allowed payment of unemployment compensation benefits to strikers in only three cases in its history, including the two cases discussed in this appeal, and only under facts similar to those present in this case where there has been no appreciable impact from the strike on the employers' continued business operations. In contrast to the Rhode Island law, the interpretation by the New Mexico Supreme Court of the New Mexico unemployment compensation statutes provides no fixed or definite policy of payment of benefits to strikers, nor allows any expectations of such payment upon which employees could reasonably predicate labor dispute strategy. In fact, the interpretation by the New Mexico Supreme Court as to when benefit payments to strikers

might be authorized runs directly counter to the employees strike objectives which is to impose as substantial an impact on the employers' business operations as possible to increase his economic burden and persuade him to a satisfactory settlement. To the extent this avowed strike strategy is realized, the eligibility of striking employees for benefits is defeated.

It is apparent, therefore, that neither the statistical history of payment of benefits to strikers nor the inconsistency between strike objectives and eligibility for benefits is likely to make the administration of the New Mexico unemployment compensation law a factor in labor dispute negotiations or to interfere with federal labor policy. The case on appeal here as well as the *Albuquerque-Phoenix Express* case illustrates this point. In neither case did the Employment Security Commission ever reach a decision on the eligibility of the claimants for benefits until after the labor dispute was settled between the parties and a new contract agreement signed.

Although this Court has established a rule of preemption in the area covered by federal labor law which broadly prohibits state regulation of matters arguably regulated by the NATIONAL LABOR RELATIONS ACT and the LABOR MANAGEMENT RELATIONS ACT, and proscribes state conduct which would interfere with the scheme of federal labor policy, it has also stated that it would not extend that doctrine of preemption so far as to "presume that congress meant to intrude so deeply into areas traditionally left to local law," *Motor Coach Employees v. Lockridge*, *supra*, p. 297; or to withdraw from the States the power to regulate "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act," *San Diego Building Trades Council v. Garmon*,

supra, p. 243; or "where the particular rule of law sought to be invoked before the [State] tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by federal labor statutes." *Vaca v. Sipes*, 386 U.S. 171 (1967), cited in *Motor Coach Employees v. Lockridge*, *supra*, pp. 297-298.

The Supreme Court of New Mexico dealt with the eligibility of the claimants for unemployment compensation benefits as a matter exclusively and traditionally within the scope of local state law and found adequate State law grounds to support its decision. It considered the question of conflict between the allowance of benefits to strikers, within the narrow limits of its decision, and federal labor policy and determined that under the limited exception permitted by its interpretation no significant conflict existed. Indeed, it is difficult to see how the payment of benefits within the limits of this exception could potentially affect the balance of interests between the parties to a labor dispute, but it is not difficult to ascertain that the New Mexico Supreme Court was addressing itself to a substantial economic concern of local importance to the State and its citizens.

The New Mexico Supreme Court's decision makes no pretense of regulating any activities arguably protected or proscribed by §§ 7 and 8 of the NATIONAL LABOR RELATIONS ACT; it does not allow the payment of benefits to strikers with any degree of fixed or definite expectancy as would possibly be the case under the Rhode Island law, and it negates any reasonable assumption that the administration of the New Mexico law would significantly interfere with any federal labor law policy. The QUESTION PRESENTED, then, within the context of the New Mexico Supreme Court's interpretation raises no substan-

tial federal question or any issue of sufficient importance to warrant this Court's assumption of appellate jurisdiction.

II

THIS CASE DOES NOT PRESENT AN APPROPRIATE RECORD UPON WHICH TO REVIEW THE FEDERAL QUESTION PRESENTED

The First Circuit Court of Appeals in *Grinnell Corp. v. Hackett, supra*, and *ITT Lamp Division v. Minter*, 435 F.2d 989 (1st Cir. 1970), cert. denied, 402 U.S. 933 (1971), viewed the asserted conflict between the payment of state unemployment benefits to strikers and federal labor policy, within the context of the Rhode Island law, as a problem of balancing state versus federal interests. In a well reasoned and perceptive opinion in both the *Grinnell* and *ITT* cases, the Circuit Court established the necessity for an evidentiary record to show, if possible, the actual impact resulting from the payment of welfare and unemployment benefits to strikers on the balancing of interests in a labor dispute, and the relative importance of state versus federal interests in the results. This Court implicitly endorsed the approach of the First Circuit Court of Appeals by denying certiorari on appeal in both cases. The Federal District Court for Hawaii, in *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations, supra*, although adopting the *a priori* assumptions rejected by the First Circuit Court of Appeals, did not disagree that an evidentiary record would be of value in determining the validity of the preemption question involved in this issue.

There is not a scintilla of evidence in the record of this case to support consideration of the questions posed by the

First Circuit Court of Appeals in its *Grinnell* and *ITT* opinions. No such evidentiary record was attempted by the Appellants in the State courts, nor could such a record have been established in this case since the labor dispute had been settled before the Employment Security Commission decided that the striking claimants were entitled to any unemployment benefits.

CONCLUSION

For the reason stated herein, the appeal in this case should be dismissed for want of probable jurisdiction.

Respectfully Submitted,
TONEY ANAYA, Attorney General
State of New Mexico
R. BAUMGARTNER
Assistant Attorney General for
Employment Security Commission
of New Mexico
P. O. Box 1928, 505 Marquette NW
Albuquerque, New Mexico 87103
Attorneys for Appellees

Dated: April 28, 1976.

APPENDIX

Names of All Individual Claimants

Kimbell, Inc., d/b/a Foodway

Lana Jean Nolan, Lucille Virginia Collins, Danie B. Clingman, Susie Padilla, Clyde R. Duncan, Dorothy L. Gray, Earl W. M. Speis, Dorothy J. Schwach, Jimmy M. Carroll, John Davis, John G. Lucero, Rudolfo Garrillo, Charlie A. Ortega, Beatrice Lopez, Bernal Sanchez, Pola S. Pacheco, Eloy L. Gilbert, Joe C. Chavez, Ruby Sweeney, Frieda V. Rael, Lorraine D. Billings, Dolores A. Vigil, Theresa Saavedra, Dorma Jean Trusty, Pete Aranda, Rosable Griego, Benito R. Baca, Robert P. Chavez, Michael D. Flores, Richard A. Mares, Delubino Jr. Romero, Robert E. Padilla, Agnes Olguin, Joe L. Apodaca, Imogen H. Holiday, Margaret Helen Roach, Ina B. Beck, Wayne Lee Johnson, Kathleen Burke, Judith S. Wiles, Victor Padilla, Jeanne D. Kohlman

Furr's, Inc.

John M. Cosentino, Arthur L. Bingaman, Bate R. Grise, Louise M. Logan, Willie M. Whitten, Mary M. Noble, Lawrence O. Saul, Frances K. Montoya, Finnimore M. Sanchez, Yoko S. Downey, Joy Barnett, John Carl Wright, Bill D. Cawthon, Bea M. Buffenmeyer, Edna I. Kotschwar, Benny Romero, Jake Aragon, Mary C. Puckett, Thelma Montoya, Aurora D. Baldonado, Admundo C. Bernal, Adolfo J. Trujillo, Paul Pacheco, Jr., Eloy Romero, Fred C. Sandoval, Patricia L. Mutchie, Tommy Torres, Betty A. Thornton, Bee Woodward, Rose J. Lovato, Narciso C. Quintana, Des W. Beevers, Gary J. Miller, David A. Johnson, Charles D. Whitmore, Larry L. Williams, Corine Ortega, Cornalio Padilla, Dolores S. Hemsing, Richard Moore, Armando Gandara, Ronnie Morga, Richard C. Clifton, Jr., James M. Coffman, Sandra Ortiz, Linda E. Snider, Eddie P. Varela, Timothy L. Sandoval, Danny Gutierrez, Sandra L. Seaborn, Jane Elizabeth Cast, Richard J. Mahboub, Jr., Barbara A. Chavez, Phyllis Ann Abel

Safeway Stores, Inc.

Stanley S. Skibitski, Ruby G. Burkhardt, Samuel G. Tolley, Clarence P. Dunn, Jack D. Wise, Nancy Shama, John S. Mickler, Delmer Eugene Clem, Horace W. Jones, Carlton R. Burkhardt, Sybil D. Webb, Donna Odell Hatfield, James C. Foster, Michael Shreve, Robert J. Weinheimer, Kathleen G. Romero, Harry J. Welesky, Ruth D. Perea, Donila D. Gallegos, Frank Aranda Griego, Raymond Plunkett, Julian Ortiz, Eyrel A. Moore, Julian Smith, Joseph W. Garcia, John T. Evans, Fidel S. Lopez, Mary Louise Karns, Joe L. Gomez, Tillie Apodaca, Wilma L. Jones, Jimmy Pacheco, Charlie J. Torres, Estella G. Barros, Lillian M. Dennis, Nellie Montoya, Albert M. Gonzales, Pablo O. Lopez, Stella Sanchez, Vincentita Lujan, Maria G. Maes, Christa Dora Sanchez, Ruby E. Wormington, Dovie C. Brown, Minfa O. Sanchez, Samuel Jaramillo, Fred E. Chavez, Manuel D. Lucero, Amadeo Sandoval, Al E. Copeland, Antonio A. Villanueva, Eloy Jaime, Horacio E. Martinez, Fred Montoya, John A. Gerhardt, Robert M. Torres, James C. Chavez, Anthony Cano, Ray E. Luna, Oliver J. Schaffer, Freddy A. Salazar, Jack L. Archer, Frank B. Gurule, Gerald L. Speis, Robert B. Haislip, Donna L. Grubb, Mary Archuleta, Joe A. Arias, Harry Valdez, Maryann S. Sprouse, Perfecto Z. Sanchez, Bunn Hern III, Jose F. R. Maestas, Nancy R. Romero, Virginia A. Lovato, Billy Roybal, Robert Sierra, Billy E. Quintana, Alfonso G. Chavez, Ralph A. Montano, Debbi Ann Alires, Felix Russell Lopez, Andre F. Chene, Tony J. Kozlowski

Shop Rite Foods, Inc., d/b/a Piggly Wiggly

Janet Gail Davis, Donald K. Kelley, Tamsye M. Romero, James A. Etherington, Richard N. Schultz, Thomas C. Campbell, Betty Lou Reed, Richard R. Tafoya, Raymond C. Gallegos, Boni Baca, Jose A. Navarro, Randy R. Carter, James H. Ingram, Louis E. Saavedra, Fred C. Encinias, Benny A. Romero, Roger Urioste, Patricia L. Lawson

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Monday, December 29, 1975

NO. 10323

KIMBELL, INC., d/b/a FOODWAY,
et al.,

Petitioners-Appellees,

vs. Bernalillo County

EMPLOYMENT SECURITY COMMISSION
OF NEW MEXICO,
Respondent-Appellant,

and

LANA JEAN NOLAN, et al.,
Respondent-Claimant
Employees-Appellants.

APPEAL FROM DISTRICT COURT
BERNALILLO COUNTY

DECISION

On the basis of the Court's opinion in Albuquerque-Phoenix Express vs. Employment Security Commission (No. 10247, Opinion filed December 24, 1975), the Judgment of the District Court of the Second Judicial District is reversed.

IT IS SO ORDERED.

John B. McManus, Jr., Chief Justice
Samuel Z. Montoya, Justice
Dan Sosa, Jr., Justice

WE DISSENT:

LaFel E. Oman, Justice
Donnan Stephenson, Justice

Filed: December 24, 1975

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

ALBUQUERQUE-PHOENIX EXPRESS, INC.,
Petitioner-Appellant,

vs.

No. 10,247

EMPLOYMENT SECURITY COMMISSION
OF NEW MEXICO,
Respondent-Appellee,
and

ROBERT R. BURGESS, et al.,
Claimants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY

FOWLIE, Judge

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Attorneys for Claimants

OPINION

McMANUS, Chief Justice.

This matter was brought in the District Court of Bernalillo County for review upon certiorari of a decision of the

Employment Security Commission (Commission) that certain claimants for unemployment compensation benefits, employees of Albuquerque-Phoenix Express, Inc., petitioner-appellant (Company), who were unemployed as a result of a labor dispute were eligible to receive unemployment benefits. This matter was presented to the court upon briefs and oral argument. From a judgment of the district court dismissing the Company's appeal and affirming the judgment of the Commission, the Company appeals to this Court.

After receiving the decision of the court adverse to it, the Company, by this appeal requests review of the following points:

1. Claimants were not available for work nor were they actively seeking work as required by § 59-9-4(A)(3), N.M.S.A. 1953 Comp.
2. Claimants were disqualified under § 59-9-5(a), N.M.S.A. 1953 Comp., as they left work voluntarily without good cause.
3. The employees should have been disqualified under § 59-9-5(d), N.M.S.A. 1953 Comp., as there was a "stoppage of work" at the Company's premises.
4. Even if "stoppage of work" is defined as a substantial curtailment of the employer's business, such a curtailment did occur.

The first issue raised concerns § 59-9-4(A)(3), *supra*, which provides, in part, as follows:

"A. An unemployed individual shall be eligible to receive benefits with respect to any week *only* if he:
• • •

"(3) is able to work and is *available for work* and is *actively seeking work*; • • •" (Emphasis added.)

The Appeals Tribunal for the Commission and the Commission itself, which adopted the ruling of the Appeals Tribunal, determined that twelve of the seventeen claimants were available for and actively seeking work. On this issue, the finding of the Appeals Tribunal, being representative of each of the twelve claimants, read in relevant part, as follows:

"The claimant was required to register for work with the New Mexico State Employment Service as a prerequisite to filing for unemployment benefits. The claimant also sought work through the union ([Teamsters] Local 492), which maintains an out-of-work list and a hiring hall. During several weeks while filing continued claims, he was successful in obtaining temporary work through the union. During about seven of these weeks, he earned more than his weekly benefit amount (\$56.00). The evidence shows that the claimant was available for full-time work had such been offered to him."

The Commission and the court below adopted this finding and we conclude that there was substantial evidence to support such a finding.

The employer seeks to have us interpret the availability and active search for work provisions of § 59-9-4(A)(3), supra, as establishing an absolute standard of availability for permanent new work with no limitations or restrictions of any kind, regardless of the circumstances prevailing in particular cases. Applying this standard to persons whose unemployment results from a labor dispute and holding them unavailable because they will not immediately return to their jobs with the employer with whom they are disputing or will not sever their employment relationship with that employer and seek permanent new work, would in all cases make such persons ineligible and render the labor dispute disqualification provisions of § 59-9-5(d), N.M.S.A. 1953 Comp., totally superfluous. (That section will be discussed in more detail in our consideration of "stoppage of work.")

On the basis of individual interviews with each claimant by Commission personnel, written documents and other reports in each claimant's file, and the record before the Commission's Appeals Tribunal, where all parties were represented, the Commission found that the claimants were available for and actively seeking work as required by § 59-9-4(A)(3), supra. The Commission further found that a number of claimants had obtained temporary intervening work, and that picket line duty was not mandatory and did not interfere with the claimants' search for or acceptance of work.

It seems obvious that the claimants herein were already employed by the Company. They expected only a temporary unemployment period and, therefore, could be available only for temporary intervening work. It would not make much sense for the Commission to demand that they, in fact, quit their jobs and really join the ranks of the unemployed, or that they abandon their legal rights and economic interest in the labor dispute and return to their jobs with the employer with whom they were disputing on the premise that their dispute was without merit.

In fact, § 59-9-5(c)(2), N.M.S.A. 1953 Comp., expressly provides:

"Notwithstanding any other provisions of this act [59-9-1 to 59-9-29], no work shall be deemed suitable and benefits shall not be denied under this act to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; * * *."

Another point for review concerns whether or not claimants left work voluntarily without good cause. The Commission held inapplicable, in the case of labor disputes such as we find here, the voluntary leaving provision of § 59-9-5(a), N.M.S.A. 1953 Comp., reading:

"An individual shall be disqualified for benefits—

"(a) For the week in which he has left work voluntarily without good cause, if so found by the commission, and for not less than one (1) nor more than thirteen (13) consecutive weeks of unemployment which immediately follow such week (in addition to the waiting period) as determined by the commission according to circumstances in each case, and such individual's total benefit amount shall be reduced in a sum equal to the number of weeks of disqualification multiplied by his weekly benefit amount."

In *Inter-Island Resorts, Ltd. v. Akahane*, 46 Haw. 140, 156-58, 377 P.2d 715, 724-25 (1962), the Supreme Court of Hawaii analyzed a provision in the Hawaii Employment Security Law quite similar to our provision, § 59-9-5(a), *supra*, in the following way:

"This argument [that claimants unemployed as the result of a labor dispute should be disqualified under the voluntary leaving provisions of the unemployment compensation law] is in direct conflict with the generally accepted interpretation of the voluntary leaving and the labor dispute disqualification provisions of the various state laws. The consensus supports the conclusion that the two disqualification provisions are mutually exclusive and that an individual whose unemployment is due to a 'stoppage of work' which exists because of a 'labor dispute' cannot be said to have 'left his work voluntarily' within the meaning of the voluntary separation provision. *T. R. Miller Mill Co. v. Johns*, 261 Ala. 615, 75 So.2d 675; *Intertown Corp. v. Appeal Board of Mich. Unemployment Comp. Comm.*, *supra*, 328 Mich. 363, 43 N.W.2d 888; *Little Rock Furniture Mfg. Co. v. Commissioner of Labor*, 227 Ark. 288, 298 S.W.2d 56; *Marathon Electric Mfg. Corp. v. Industrial Comm.*, 269 Wis. 394, 69 N.W.2d 573, 70 N.W.2d 576; *Lesser, Labor Dispute and Unemployment Compensation*, 55 Yale Law Journal 167.

"It is one of the fundamental tenets of the unemployment compensation law that the administering

agency remain neutral in the labor dispute and refrain from passing on the merits of the dispute. Courts almost unanimously hold that the merits of a labor dispute are immaterial in determining the existence of the dispute, the rationale being that the unemployment compensation fund should not be used for the purpose of financing a labor dispute any more than it should be withheld for the purpose of enabling an employer to break a strike. *Sakrison v. Pierce*, *supra*, 66 Ariz. 162, 185 P.2d 528; *In re Steelman*, *supra*, 219 N.C. 306, 13 S.E.2d 544; *Amory Worsted Mills, Inc. v. Riley*, 96 N.H. 162, 71 A.2d 788; *W. R. Grace & Co. v. California Employment Comm.*, 24 Cal.2d 720, 151 P.2d 215; *Byerly v. Unemployment Comp. Board of Review*, 171 Pa. Super. 303, 90 A.2d 322; *Lawrence Baking Co. v. Michigan Unemployment Comp. Comm.*, *supra* 308 Mich. 198, 13 N.W.2d 260; *T. R. Miller Mill Co. v. Johns*, *supra*, 261 Ala. 615, 75 So.2d 675.
* * *

"Moreover, the terms 'leaving work' or 'left his work' as used in unemployment compensation laws refer only to a severance of the employment relation and do not include a temporary interruption in the performance of services. *Kempfer, Disqualification for Voluntary Leaving and Misconduct*, 55 Yale Law Journal 147, 154. Absence from the job is not a leaving of work where the worker intends merely a temporary interruption in the employment and not a severance of the employment relation. Such is the case of strikers who have temporarily interrupted their employment because of a labor dispute. Under the prevailing view, they have not been deemed to have terminated the employment relationship and the voluntary leaving disqualification has no application to them. *T. R. Miller Mill Co. v. Johns*, *supra*, 261 Ala. 615, 75 So.2d 675; *Mark Hopkins, Inc. v. California Employment Comm.*, 24 Cal.2d 744, 151 P.2d 229, 154 A.L.R. 1081; *Knight-Morley Corp. v. Michigan Employment Security Comm.*, 352 Mich. 331, 89 N.W.2d 541; *Marathon Electric Mfg. Corp. v. Indus-*

trial Comm., *supra*, 269 Wis. 394, 69 N.W.2d 573, 70 N.W.2d 576."

We fully adopt this reasoning.

The third point upon which appellants rely is that the employees should have been disqualified for unemployment compensation benefits under § 59-9-5(d), N.M.S.A. 1953 Comp., which provides, in part, that:

"An individual shall be disqualified for benefits"

"(d) For any week with respect to which the commission finds that his unemployment is due to a *stoppage of work* which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed; Provided, that this subsection shall not apply if it is shown to the satisfaction of the commission that—

"(1) He is not participating in or directly interested in the labor dispute which caused the *stoppage of work*; and

"(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the *stoppage*, there were members employed at the premises at which the *stoppage* occurs, any of whom are participating in or directly interested in the dispute;" (Emphasis added.)

The appellants claim that the term "stoppage of work" refers to the individual efforts of the employee, while the appellees argue that "stoppage of work" refers to a cessation or substantial curtailment of the employer's business. We are thus called upon to interpret this term.

We are not the first state supreme court to be confronted with this question. All fifty states have adopted unemployment compensation laws, and a majority of them have a provision disqualifying employees from benefits if the "unemployment is due to a stoppage of work which

exists because of a labor dispute" Shadur, Unemployment Benefits and the "Labor Dispute" Disqualification, 17 U. Chi. L.Rev. 294 (1950); Lewis, The "Stoppage of Work" Concept in Labor Dispute Disqualification Jurisprudence, 45 J. Urban L. 319 (1967); Annot., 61 A.L.R.3d 693 (1975). About twenty of the states have interpreted the term "stoppage of work" to mean a cessation or a substantial curtailment of the employer's business, while only one — Oklahoma — has interpreted the term to mean a stoppage of the individual work of the employee. Annot., 61 A.L.R.3d 693 (1975). We agree with the majority of states and conclude that the term "stoppage of work," as it is used in the context of our Unemployment Compensation Act, refers to the employer's business rather than the employee's work.¹

The term "stoppage of work" was originally taken from "Draft Bills" prepared by the Committee on Economic Security, which in turn borrowed the phrase from British Unemployment Insurance Acts. Shadur, Unemployment Benefits and the "Labor Dispute" Disqualification, *supra*. Therefore, it is significant to note that:

"When this country's fifty-one statutes were adopted, the phrase had long since acquired a settled construction from the British Umpires as referring 'not to the cessation of the workman's labour, but to a stoppage of the work carried on in the factory, workshop or other premises at which the workman is employed.' "

Id. at 308.

Were the phrase "stoppage of work" to refer to the employee's work, it would be redundant in the sentence "his

¹We note the recent case of Hawaiian Tel. Co. v. State of Hawaii Dept. of L. and I. Rel., ____ F.Supp. ____ (D. Hawaii 1975), wherein the Federal District Court of Hawaii declared that the State of Hawaii's interpretation and application of the "stoppage" of work clause in its Unemployment Compensation Act so impermissibly alters the relative economic strength of union versus employer in their bargaining relationship as to thereby encroach upon the field preempted by the National Labor Relations Act in violation of the supremacy clause of the U.S. Constitution. We do not find this decision persuasive because it totally overlooks the fact that in order to qualify for unemployment compensation a striker must be available for, and actively seeking work.

unemployment is due to a stoppage of work which exists because of a labor dispute * * *." If the statute read "his unemployment is due to a labor dispute," or "he stopped working because of a labor dispute," then it would be clear that the legislature intended to disqualify from receiving benefits all those employees who stop work because of a labor dispute, no matter how minimal the impact of their stopping is on the employer's operations.

Furthermore, the sentence "He is not participating in or directly interested in the labor dispute which caused the stoppage of work * * *" would be an extremely clumsy way of phrasing the idea, if "stoppage of work" referred to the employee's individual work. In fact, if we interpreted "stoppage of work" in this way, the whole of section (d) would read awkwardly at best. Therefore, a common sense approach to the words in their context leads us to the same conclusion that nearly all other courts have reached — that "stoppage of work" refers to the employer's business.

Finally, it must be stressed that our role in this situation is not to usurp the legislative function. As the Supreme Court of Arizona aptly pointed out in *Sakrison v. Pierce*, 66 Ariz. 162, 165-66, 185 P.2d 528, 530-31 (1947):

"* * * Much is made in counsel's briefs of policy considerations. For example, on the one hand lies the charge that to allow compensation in such a case as this would be, in effect, to force employers and the state to finance a strike. On the other hand, it is claimed that to deny it would be to deny aid to those whom, among others, the Act was designed to protect (i.e., those who had participated in a labor dispute and lost — at least to the extent that others now had their jobs and their former employer's operations had been fully resumed). And that finally, a denial of compensation would seriously cripple their unquestioned right to strike. At the outset it should be made clear that this court is not concerned with any questions relative to the merits of the labor controversy itself. Our decision is not and cannot

be determined by such factors. Instead it is determined by the choice that the elected legislative representatives of the people of this state have made for us. And whether or not the Act should compensate employees in this position is properly a choice for the legislature. * * * The function of this court, then, is simply to point out which route our legislature has chosen to travel."

Having then concluded that "stoppage of work" means a cessation or substantial curtailment of the employer's business, we are next confronted with the question of whether the employer's business was substantially curtailed at any time during the period from July 20, 1970 until November 30, 1970 when these workers went out on strike. What constitutes a substantial curtailment of work or operations at the employing establishment has generally been regarded by the courts as a question dependent upon the facts and circumstances of each case. Annot., 61 A.L.R.3d 693, 705 (1975). We agree.

The district court determined that the Commission's findings were supported by substantial evidence in the record as a whole, and accordingly adopted and entered the following findings of fact, among others, just as they had appeared in the Commission's decision of August 9, 1971:

"7. Members of Teamster's Local No. 492 who struck the employer's place of business comprised about twenty percent of the employer's total work force.

"8. Immediately after commencement of the strike, the employer began hiring replacements for the striking employees and had replaced as many as necessary to continue normal operations within a few days.

"9. With the exception of some impact on the employer's interline freight business, there was no cessation of normal business activity or curtailment of the work force or productivity at the employer's place of business or establishment during the labor dispute."

The appellant challenges findings 8 and 9 and argues that the labor dispute did cause a substantial curtailment of the employer's business, thereby permitting the labor dispute disqualification provision, § 59-9-5(d), supra, to apply to the claimants here involved. In support of this challenge, appellant refers us to two letters from the attorney for the Company sent to the Commission in which certain unsubstantiated and unsupported figures relating to the curtailment of the Company's business are contained.

In contradistinction to these unverified figures we have the sworn testimony of Duncan A. McLeod, president of the Company, from the transcript of the hearings before the Commission on November 16, 1970. On direct examination, he testified as follows:

"Q Wasn't there any cessation of productive activity at your place of business resulting from this strike at any time?

"A No, not necessarily. We got back and it was operating.

"Q Well, when all these men who are employed, who apparently were employed by you prior to July 20th, who left their work, didn't that interfere with your production at all?

"A Oh, we were a little slow for a few days."

Appellant also refers us to certain pages in the supplemental transcript of record, but we have yet to find any evidence there which casts any doubt upon the accuracy of the district court's findings.

In short, the appellant has failed to demonstrate to us that there is any reason to reject the findings of the Commission and the district court with regard to the impact that the labor dispute had on the employer's business. There was substantial evidence to support the district court's find-

ings 7, 8 and 9, and we conclude that the employer's business did not suffer any substantial curtailment when the employees involved here walked off their jobs.

The judgment of the trial court will be affirmed.

IT IS SO ORDERED.

John B. McManus, Jr.,
Chief Justice

WE CONCUR:

Samuel Z. Montoya, J.
Dan Sosa, Jr., J.

OMAN and STEPHENSON, JJ, dissenting.

STEPHENSON, J. (dissenting)

I am unable to agree with the construction placed by the majority upon the Labor Dispute Disqualification section of the New Mexico Unemployment Compensation Law, § 59-9-5(d), N.M.S.A. 1953. The construction of that statute which I believe to be correct would require a decision for the company without reaching the other issues dealt with by the majority. I will accordingly confine my comments to that issue.

The court below found that the claimants were employees of the company and members of a labor union. Failing to reach a mutually satisfactory collective bargaining agreement with the company on economic issues, the union and the employees struck the company's place of business. All of the claimants participated in the strike. Union members who struck the company comprised about twenty percent of the company's total work force. However, under the construction I would place upon the cited statute, this fact is irrelevant.

The Commission contends that "stoppage of work," as that term is used in § 59-9-5(d), refers not to the claimant's work, but to a stoppage or curtailment of the employer's operation. The question is one of first impression in this state. The majority has opted for the Commission's interpretation, but in my opinion the phrase refers to a cessation of work by the employees as a result of a labor dispute, viz. a strike.

I would concede that the statute is awkwardly worded. By parsing the sentence in differing ways and substituting words for phrases, proponents of the two contending theories can endlessly argue that the theory which they espouse is the more reasonable, as the parties have done in their briefs. For example, one could point out that in § 59-9-5 the word "work" is used in each subsection. In the earlier ones the word clearly refers to the employee, and it would be anomalous to apply a different meaning to the work in subsection (d). I eschew this argument as the basis for my opinion, although I agree with the reasoning of the majority in *Board of Review v. Mid-Continent Petroleum Corp.*, 193 Okla. 36, 141 P.2d 69 (1943). I do not think the statute, however inartfully worded, is that opaque.

I premise my opinion on rather simple and well-settled rules of statutory construction and grammar. This court in its opinion in *In re Goldsworthy's Estate*, 45 N.M. 406, 115 P.2d 267 (1941), quoting from Sutherland on Statutory Construction § 408 (2 ed. 1904), said:

"Statutes as well as other writings are to be read and understood primarily according to their grammatical sense, unless it is apparent that the author intended something different. In other words, it is presumed that the writer intended to be understood according to the grammatical purport of the language he has employed to express his meaning."

The court then proceeded to define the doctrine of the last antecedent by quoting from 59 C.J. Statutes § 583 (1932) as follows:

"By what is known as the doctrine of the 'last antecedent,' relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote."

See also *Hughes v. Samedan Oil Corporation*, 166 F.2d 871 (10th Cir. 1948). Applying these rules to the statute before us, we observe that a "labor dispute" and not a "stoppage of work" must exist at the factory, establishment or other premises.

I agree with the reasoning of the special concurring opinion of Justice Davison in *Board of Review v. Mid-Continent Petroleum Corp.*, supra. Justice Davison stated the definition of the last antecedent rule, quoting from a prior Oklahoma case, to be:

"A limiting clause in a statute is generally to be restrained to the last antecedent, unless the subject matter requires a different construction."

Certainly there is nothing about the subject matter here which requires a different construction. He then continued:

The last antecedent in the statute before us is the "labor dispute," not the "stoppage of work."

A labor dispute may exist at the factory without a "shutdown." Of course, if a labor dispute does result in a shutdown or stoppage of operations at the plant or factory it may result in a stoppage of work for individuals not involved in the labor dispute. Individuals not so involved are the subject of consideration by the legislature in the statutory provisions immediately succeeding the above-quoted language.

It is thus my opinion that the thing which must exist at the factory is, under the terms of the statute, the labor dispute, not the stoppage of work; that when the

labor dispute exists at the factory resulting in a stoppage of work by the individual he is disqualified to receive benefits if he is a participant in the labor dispute and not working by reason of his own voluntary desire, regardless of whether the factory stops or does not stop operating.

My opinion is bolstered by other considerations, though I reach the above conclusion without their aid. I note the statement of policy which the Legislature included in the Act in § 59-9-2 N.M.S.A. 1953.¹ I cannot read the phrase "through no fault of their own" as meaning or implying evil or wrongdoing or that an employee's work stoppage was subject to censure. *Board of Review v. Mid-Continent Petroleum Corp.*, *supra*. In ordinary parlance it would mean unemployment due to the employee's own volition or at his decision or election. Considering the phrase in § 59-9-2 in that light, it is clear to me that the very purpose of the Act is to provide compensation for those who are involuntarily unemployed. That certainly does not include strikers.

As the majority has pointed out, the conclusion that they have reached is supported by a majority of cases which have passed upon the issue. Most of these cases trace their way back to *Lawrence Banking Co. v. Michigan Unemployment C. Com'n*, 308 Mich. 198, 13 N.W.2d 260 (1944). That case appears to rely heavily on the English National Insur-

¹"Declaration of state public policy. As a guide to interpretation and application of this act [59-9-1 to 59-9-29], the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. *Involuntary unemployment* is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state requires the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own". (Emphasis added.)

ance Act of 1911 and on cases construing it. Bearing in mind that we are now in the year 1976 and that the issue presented is one of first impression in New Mexico, no reason has been suggested to me as to why we should now adopt a construction placed upon a statute of a foreign country by authorities charged with its administration not long after the turn of the century. In fact I am not at all sure why the Michigan court in *Lawrence Baking Co.* even addressed the problem which confronts us. The claimants there were not at any material time unemployed because of a labor dispute so far as I can determine from the opinion. To the contrary, they were unemployed because they had been discharged and replaced by others. The strike for all practical purposes, only lasted about fifteen minutes. I further observe that two strong dissents were filed in *Lawrence Baking Co.* with which I generally agree.

Much is said in the briefs about whether or not a governmental policy of neutrality exists in relation to strikes, a subject touched upon by the majority in its discussion of *Sakrison v. Pierce*, 66 Ariz. 162, 185 P.2d 528 (1947). Since I do not predicate my opinion upon the existence or non-existence of such a policy, I express no opinion as to its existence. I will content myself with saying that if it does not exist, it should.

Still bearing in mind that we are confronted with an issue of first impression and that we are free to adopt an interpretation of the statute which now best suits our situation, I find it interesting that in more modern times several states have refused to adopt "stoppage of work" language, or have eliminated that language after state courts have allowed unemployment compensation to be paid to strikers. In New York and California "stoppage of work" language is absent and strikers are generally ineligible for benefits. For example, see Cal. U nep. Ins. § 1262 (West 1972); N.Y. Labor Law § 592 (McKinney 1965) (seven week waiting period); Colo. Rev. Stat. Ann. § 8-73-109 (1974). There are about fifteen such states. The Texas statute reads "claimant's work stoppage." Vernon's Tex. Stat. art.

5221b-3 (1971). Two cases decided in the 1950's in Arizona held that stoppage of work referred to the employer's business. *Sakrison v. Pierce*, *supra*; *Mountain States Tel. & Tel. Co. v. Sakrison*, 71 Ariz. 219, 225 P.2d 707 (1950). Soon thereafter in 1952 the Arizona Legislature deleted "stoppage of work" and disqualified those employees involved in a labor dispute. Ariz. Rev. Stat. Ann. § 23-777 (1971). Michigan also changed its statute after the courts interpreted stoppage of work as the employer's operation. *Lawrence Baking Co. v. Michigan Unemployment C. Com'n*, *supra*, and Mich. Comp. Laws Ann. § 421.29 (1967).

For the reasons stated, I respectfully dissent.

Donnan Stephenson
Justice

I CONCUR:

LaFel E. Oman, C.J.

20a

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Thursday, January 15, 1976

NO. 10323

KIMBELL, INC., d/b/a FOODWAY,
et al.,

Petitioners-Appellees,

vs.

Bernalillo County

EMPLOYMENT SECURITY COMMISSION
OF NEW MEXICO,

Respondent-Appellant,

and

LANA JEAN NOLAN, et al.;

Respondents-Claimants-
Employees-Appellants.

This matter coming on for consideration by the Court upon motion of Appellees for a rehearing, and the Court having considered said motion and being sufficiently advised in the premises:

NOW, THEREFORE, IT IS ORDERED that the motion of Appellees for rehearing be and the same is hereby denied.

ATTEST: A TRUE COPY
Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico.
(SEAL)

21a

Filed: March 24, 1976

**IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO**

KIMBELL, INC., d/b/a FOODWAY,
FURR'S, INC., ALLIED SUPER-
MARKETS, INC., d/b/a K-MART,
SAFEWAY STORES, INC., and
SHOP RITE FOODS, INC., d/b/a
PIGGLEY WIGGLEY,

Petitioners-Appellees,

v.

No. 10323

EMPLOYMENT SECURITY COMMISSION
OF NEW MEXICO,

Respondent-Appellant,

and

LANA JEAN NOLAN, et al.,

Respondent-Claimant
Employees-Appellant.

**NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES**

Notice is hereby given that Kimbell, Inc., d/b/a Foodway, Furr's, Inc., Safeway Stores, Inc., and Shop Rite Foods, Inc., d/b/a Piggley Wiggley, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico reversing judgment of the District Court of the Second Judicial District, entered in this action on December 29, 1975, and from the order of the Supreme Court of the State

of New Mexico entered January 15, 1976, denying the Motion of Appellees for a Rehearing.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

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This will certify that on this
22nd day of March, 1976, in
compliance with Rule 33(1) of
the Rules of the Supreme Court
of the United States, a copy of
the foregoing Notice of Appeal
was served upon the following
being all parties:

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MOTION FILED
AUG 27 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1452

KIMBELL, Inc., d/b/a FOODWAY, FURR'S, INC., SAFeway
STORES, INC., and SHOP RITE FOODS, INC., d/b/a PIGGLY
WIGGLY,

Appellants,

—v.—

EMPLOYMENT SECURITY COMMISSION OF THE STATE OF
NEW MEXICO and LANA JEAN NOLAN, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEW MEXICO

**MOTION FOR THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA FOR LEAVE
TO FILE BRIEF *AMICUS CURIAE* AND
BRIEF *AMICUS CURIAE***

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1452

KIMBELL, INC., d/b/a FOODWAY, FURR'S, INC., SAFEWAY
STORES, INC., and SHOP RITE FOODS, INC., d/b/a PIGGLY
WIGGLY,

Appellants,

—v.—

EMPLOYMENT SECURITY COMMISSION OF THE STATE OF
NEW MEXICO and LANA JEAN NOLAN, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEW MEXICO

**MOTION FOR THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA FOR LEAVE
TO FILE BRIEF *AMICUS CURIAE***

The Chamber of Commerce of the United States of America ("the Chamber") hereby respectfully moves pursuant to Rule 42 of the Rules of the Supreme Court of the United States for leave to file the attached brief *amicus curiae* in this case.

This application for leave is made in lieu of requesting and obtaining the written consents of all parties as authorized by Rule 42(1). Appellants filed the appeal herein on April 12, 1976. Thereafter, on April 28, 1976, appellees moved to dismiss for want of probable jurisdiction. As re-

ported at 44 U.S.L.W. 3685, the Court invited the Solicitor General on June 1, 1976, to file a brief in this case to present the views of the United States. It was that invitation, subsequently brought to the attention of the Chamber and its attorneys, which has prompted this motion. This motion is made, with brief attached, within four days of receipt of a copy of the Solicitor General's brief, thereby avoiding, we believe, any significant delay in the Court's consideration hereof.

The immediate interest of the Chamber stems from its current status as a full party or as *amicus curiae* in no less than four lawsuits now pending before the federal courts presenting the same generic issue involved on this appeal—whether the grant of unemployment insurance benefits to strikers under state statute contravenes the Supremacy Clause of the Constitution of the United States by impermissibly infringing upon the national labor policy guaranteeing both employers and employees the right to bargain freely without state interference and insuring government neutrality and non-interference in the collective bargaining process. These cases and the Chamber's status in each are as follows: *Hawaiian Telephone Co. v. State of Hawaii Dept. of Labor and Industrial Relations*, 405 F. Supp. 275 (D. Hawaii 1975), *appeals filed*, 9th Cir., Mar. 3, 1976 (party plaintiff-intervenor); *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1973), *cert. denied*, 414 U.S. 858 and 414 U.S. 879, *on remand for trial to the United States District Court for Rhode Island*, Civil No. 4926 (party plaintiff-intervenor); *Dow Chemical Co. v. Taylor*, 57 F.R.D. 105, Civ. No. 38644 (E.D. Mich.) (Chamber granted status of *amicus curiae* in pending trial); *Shell Oil Co. v. Brooks*, No. C. 74-1935 (W.D. Wash.) (party plaintiff). The outcome of the appeal herein

therefore is of direct and substantial interest to the Chamber because of its potential effect on the foregoing cases.

In all of the above-listed pending cases in which the Chamber is a party-intervenor or *amicus curiae*, and in *New York Telephone Company, et al. v. New York State Department of Labor, et al.*, 73 Civ. 4557, which has been tried and briefed in the United States District Court for the Southern District of New York and is presently *sub judice*, a full record documenting and measuring the impact on collective bargaining and on strikes of the unemployment insurance subsidy to strikers has been made at trial or is expected to be made thereat. In the case at bar no such record has been made and unless, as we contend, the language of this Court in *Super Tire* (see attached brief, pp. 15-16) is deemed to call for a summary reversal here, we submit that the record at bar offers no basis for a factual finding of infringement or noninfringement on the federal labor policy.

The basic underlying interest of the Chamber arises from these facts: The Chamber is a federation consisting of over 3,600 state and local chambers of commerce and professional and trade associations, and a direct business membership in excess of 58,000. An overwhelming majority of these members bargain collectively under the National Labor Relations Act, as amended ("the NLRA"). This bargaining is conducted under the policy (found by this Court to underlie that Act) that the government shall not intervene to upset the balance struck by Congress between the conflicting interests of the contending parties in a strike or other labor controversy. The substantiality of their interest, and therefore of the Chamber's interest, in any

case that involves a claim which could effect a departure from that policy needs no further elaboration.

Under these circumstances we respectfully ask leave to submit the attached brief at this stage of the case to present to the Court the reasons why (a) there should be a summary reversal of the decision below on the ground that it is clearly erroneous, or, in the event of any other disposition, (b) this Court should preserve for consideration by the courts below and, ultimately, for itself, on appropriately complete records, the question whether state legislation commanding the payment of unemployment insurance benefits to strikers is in constitutional conflict with the federal labor policy of governmental neutrality in labor disputes.

As a national organization whose membership is broadly representative of American industry and one which has devoted considerable research to the question at hand, the Chamber is in a unique position to present to this Court facts illustrative of the kind of proof that would be available on a fully developed record concerning the impact of unemployment insurance benefits on free collective bargaining and strikes. Its position in this regard is reinforced by its familiarity with the numerous pending lawsuits which address the issues of factual impact and constitutional conflict in depth and with completeness.

Dated: New York, New York
August 27, 1976

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1452

KIMBALL, Inc., d/b/a FOODWAY, FURR'S, INC., SAFEWAY
STORES, INC., and SHOP RITE FOODS, INC. d/b/a PIGGLY
WIGGLY,

Appellants,

—v.—

EMPLOYMENT SECURITY COMMISSION OF THE STATE OF
NEW MEXICO and LANA JEAN NOLAN, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEW MEXICO

BRIEF FOR THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA
AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The question here presented is whether New Mexico's grant of unemployment insurance benefits to strikers conflicts with the federal policy of government neutrality in labor disputes, disturbs the balance of power between employers and unions in such disputes, and is thereby preempted under Article VI of the Constitution.

The Chamber of Commerce of the United States of America ("the Chamber") has applied for leave to submit this brief *amicus curiae* because the judgment below (which would validate such benefits) in its view materially alters and would indeed frustrate the accomplishment of the full purposes and objectives of the federal labor policy just described.

The immediate interest of the Chamber as a party-intervenor or as *amicus curiae* in four pending lawsuits posing the same generic question as the appeal herein and its underlying interest in defending, on behalf of its members, the existing policy of government neutrality in labor disputes against nullification or diminution, are set forth in greater detail in its motion for leave to file this brief.

The Chamber believes, and will argue, that the error in the holding below is so manifest as to call for summary reversal. It will urge, moreover, that in any event the case should be so dealt with by this Court as not to preclude consideration of the above-described Constitutional question in cases presently pending in the federal court system having fuller and more illuminating records than has the case at bar.

Summary of Argument

The federal labor policy of free collective bargaining and government neutrality in labor disputes is pre-emptive and supreme. State laws granting unemployment insurance benefits to strikers violate this policy and impermissibly and unconstitutionally disturb the balance of power between labor and management expressed in the national labor laws.

The grant of such benefits to strikers impacts substantially on collective bargaining and strikes. For it provides subsidy for the strikers and, at the same time, increases the employer's financial obligations by imposing upon him, through unemployment insurance tax rates set on the basis of experience rating, the full costs thereof. In effect, the employer is forced to finance a strike against himself.

The record below does not present and the decision does not consider the impact of benefits on collective bargaining and strikes. Nor does the decision consider or apply the leading labor preemption decisions of this Court. The impact of monetary benefits for strikers, however, may be judicially noticed as it was in this Court's decision in the *Super Tire* case (see p. 15, *infra*)¹ and on that basis alone the decision below should be reversed on the ground it is clearly erroneous. This conclusion is confirmed by the subsequent decision of this Court in *Wisconsin* (see p. 11, *infra*) which calls for invocation of the preemption doctrine here and, at the very least, for an order vacating the decision below with a remand for reconsideration in the light thereof.

The Solicitor General's view that legislative history summarily disposes of the preemption doctrine as far as unemployment insurance benefits are concerned is at odds with decisions of the Court of Appeals for the First Circuit, with federal district court decisions in Hawaii, Michigan and New York and, we contend, with the history itself. The opinion in *Grinnell* (see p. 13, *infra*), which gave careful scrutiny to the legislative history as a whole (including all

¹ This case involved welfare benefits where the impact, if anything, is less than that of unemployment compensation (see p. 16, *infra*).

of the portions thereof referred to by the Solicitor General), concluded that "unambiguous congressional intent is lacking" therefrom.

The inherent conflict between unemployment compensation for strikers and the federal labor policy has been amply demonstrated in cases which have been tried, and is expected to be so demonstrated in several other cases now pending before the federal courts. These cases will provide fuller and more complete records than the relatively bare record at bar. The disposition of this case, therefore, should not foreclose subsequent determinations in the pending cases where the issue is more completely and less abstractly presented.

ARGUMENT

I.

The Grounds for a Summary Reversal Here

A. The Federal Labor Policy Guarantees Employers and Unions Government Neutrality in Labor Disputes and the Right to Engage in Free Collective Bargaining.

There are few areas of federal law, if any, which have been vouchsafed the degree of judicial protection from state interference as have labor-management relations and collective bargaining. This Court over the years has repeatedly confirmed its undeviating intent to guard these areas from state intrusion.² In the Court's most recent

² E.g., *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959); *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964); *Amalgamated Association of Street, Electric Ry. & Motor Coach Employees of America v. Lockridge*, 403 U.S. 274 (1971).

pronouncement concerning labor law preemption, it once again affirmed the preemptive and supreme quality of the federal labor policy. *Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission* — U.S. —, 44 U.S.L.W. 5026 (June 25, 1976) (hereafter "Wisconsin").³

Free collective bargaining, as insured by the federal labor policy, is premised on the concept of government non-interference and neutrality. While the government "acts to oversee and referee the process of collective bargaining," it leaves "the results of the contest to the bargaining strengths of the parties." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). Indeed, the right to bargain collectively clearly contemplates economic warfare and "does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 309 (1965); *Wisconsin*, 44 U.S.L.W. at 5031-32. For, as a practical matter, it is the use of economic force or the availability of such force in reserve that acts as the prime motive or catalyst under the federal scheme for reaching agreements in collective bargaining. *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 489 (1960).⁴

³ Other recent Court decisions provide further examples of the Court's intent to guard against state interference with the delicate federally-created balance of power in the labor relations area by invoking the doctrine of federal labor law preemption. E.g., *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975); *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Beasley v. Food Fair, Inc.*, 416 U.S. 653 (1974).

⁴ As quoted by this Court in its recent Wisconsin decision (44 U.S.L.W. at 5031):

" . . . the use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the [federal] Act; it is part and parcel of the process of collective bargaining." *Insurance Agents*, 361 U.S., at 495.

States are forbidden to "upset the balance of power between labor and management expressed in our national labor policy." *Morton*, 377 U.S. at 260; *Wisconsin*, 44 U.S. L.W. at 5032. Certainly state laws (such as the unemployment insurance law here under review) resting upon a state's views concerning the accommodation of the respective interests of employers, employees, unions and the public in collective bargaining and labor disputes would clearly fall within the area occupied by the federal labor laws and, accordingly, cannot stand. Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352-54 (1972).

With but few exceptions the federal and state courts have uniformly preempted and invalidated state action whenever it could be shown that it had a significant effect, whether direct or indirect, upon the parties in collective bargaining or in a labor dispute. This Court recently has so ruled in *Wisconsin*, *Connell* and *Austin* (see notes 2 and 3, *supra*) and earlier in *Morton*, *UAW v. O'Brien*, 339 U.S. 454 (1950), and in a host of other decisions. Other courts have done so in *General Electric v. Callahan*, 294 F.2d 60 (1st Cir. 1961), petition for cert. dismissed, 369 U.S. 832 (1962); *Oil, Chemical & Atomic Workers v. Arkansas Louisiana Gas Co.*, 332 F.2d 64 (10th Cir. 1964); *Grand Rapids City Coach Lines v. Howlett*, 137 F. Supp. 667 (W.D. Mich. 1955); *Delaware Coach Co. v. Public Service Commission*, 265 F. Supp. 648 (D. Del. 1967); *Rochester Telephone Corp. v. Levine*, — F. Supp. —, 90 L.R.R.M. 3032 (W.D.N.Y. 1975); *John Hancock Mutual Life Insurance Co. v. Commissioner of Insurance*, 349 Mass. 390, 208 N.E. 2d 516 (1965).

B. The Legislative History Does Not Create an Exception to Federal Labor Policy in the Case of Unemployment Benefits for Strikers.

After reviewing the relevant legislative history, the First Circuit concluded, in *Grinnell Corp. v. Hackett*, 475 F.2d 449, 454 (1973), that:

[t]he existing legislative record is not sufficiently clear to establish Congressional intent either way.

and, at 457, that:

The *most* that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances.

. . . [U]nambiguous Congressional intent is lacking.
. . . [Emphasis supplied]

The Solicitor General disagrees, arguing in his memorandum here that the legislative history is conclusive. But the court below in this case never reviewed or even considered the area of legislative history. And every court that has (e.g., the federal district courts in *Dow Chemical Co. v. Taylor*, 57 F.R.D. 105 (E.D. Mich. 1972), *Hawaiian Telephone Co. v. State of Hawaii Dept. of Labor and Industrial Relations*, 405 F. Supp. 275 (D. Hawaii 1975), *appeals filed*, 9th Cir., Mar. 3, 1976) and *New York Telephone Co., et al. v. New York State Dept. of Labor, et al.*, 73 Civ. 4557 (S.D.N.Y., Mar. 26, 1975), and the First Circuit in *Grinnell*) reached a conclusion contrary to that of the Solicitor General, namely, that the relevant legislative history is inconclusive.

If any inferences may be fairly drawn from the legislative history, we submit, they are that (a) Congress in the National Labor Relations Act intended to strike a balance among the respective interests of the parties in collective bargaining (see *Wisconsin*, 44 U.S.L.W. at 5031-32), (b) Congress never intended that the states would grant unemployment compensation to strikers, and (c) where Congress intended to assist strikers financially, it has expressly done so.

In passing the Social Security Act of 1935, Congress did not anticipate that the unemployment compensation program would be extended by the states to strikers. For the entire unemployment insurance system was established in response to the experience of the Great Depression (*Steward Machine Co. v. Davis*, 301 U.S. 548, 586 (1937)) to "cushion the shock of seasonal, cyclical, or technological unemployment" for persons involuntarily unemployed. *ITT Lamp Division v. Minter*, 435 F.2d 989, 994-95, cert. denied 402 U.S. 933 (1971). The objective of the Congress, as noted by this Court, "was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." *California Dept. of Human Resources Development v. Java*, 402 U.S. 121, 130 (1971) (emphasis supplied). Strikers do not fall within any of these categories of beneficiaries contemplated by Congress.

Thus, it was not unexpected that in 1936 the Federal Social Security Board, which in its advisory role was called upon to draft a model unemployment insurance bill to aid the states in drafting legislation to conform with the federal enabling law, therein expressly denied benefits to strikers. *Social Security Board, Draft Bills for State Unem-*

ployment Compensation of the Pooled Fund and Employer Reserve Account Types, § 1(5) (rev. ed. Jan. 1937).

Consistent with this view is the fact that when Congress acted to legislate a local unemployment insurance law for the District of Columbia, it enacted a law which denied benefits to strikers. D.C.C. § 46-310 (f).

As for Congress' grant of benefits to strikers under the Food Stamp Act and Railway Labor Act and the Solicitor's argument based thereon, the First Circuit, in *Grinnell*, 475 F.2d at 457, reviewed those laws and concluded that no reasonable inference could be drawn either way, noting in part that:

given the ability of Congress to articulate that intent [of granting benefits to strikers] in other programs, one might also infer that its silence in the unemployment compensation statute was indicative of a contrary intent. . . .

C. As a Matter of Law, the Grant of Unemployment Insurance Benefits to Strikers Unconstitutionally Violates the Federal Labor Policy of Government Neutrality in Labor Disputes and Collective Bargaining.

The impact of welfare assistance to strikers was the subject of judicial notice by this Court in *Super Tire Eng. Co. v. McCorkle*, 416 U.S. 115, 124 (1974), where it was observed:

It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective bargaining agreement, and is a factor lurking in the background of every incipient labor contract.

The question, of course, is whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes. In this sense petitioners allege a colorable claim of injury from an extant and fixed policy directive of the State of New Jersey. That claim deserves a hearing.

The potential impact of unemployment insurance benefits for strikers on collective bargaining and on work stoppages, if anything, is more pervasive than that of welfare assistance.⁵ For unemployment compensation is granted as of right and not on the basis of need; *it, moreover, not only provides subsidy for the strikers but imposes the cost thereof on their employers.*⁶ Under experience rating, unemployment insurance tax rates for each employer are set on the basis of his individual experience, in effect requiring him to pay for the benefits collected by his employees or former employees. Thus, experience rating is a conduit

⁵ A decision on the issue of federal labor law preemption was reached after a plenary trial on the merits in only one federal court case involving the payment of unemployment insurance benefits to strikers, *Hawaiian Telephone*. The Hawaiian law there in dispute, in all material respects, was virtually identical to the New Mexico law here under challenge. The court in the *Hawaiian Telephone* case indicated that the above-quoted passage of this Court in *Super Tire* might eliminate any need for a factual inquiry on the issue of impact of unemployment compensation for strikers. 405 F. Supp. at 277. Nevertheless, believing that such an inquiry might be of assistance to the court, it ordered one conducted. After a trial the court concluded that the payment of benefits to strikers interferes with free collective bargaining and government neutrality in labor disputes, as insured by the federal labor policy, and thereby violates the Supremacy Clause of the United States Constitution. *Id.* at 290.

⁶ Welfare programs, in contrast, are funded by the community at large and not by the struck employers themselves.

through which the employer's own funds are funnelled to subsidize his striking employees. This circumstance, without more, requires invalidation of state statutes which pay unemployment compensation to strikers, for the National Labor Relations Board has long held that an employer may not be required to subsidize a strike against himself. See, e.g., *Southwestern Electric Power Co.*, 216 N.L.R.B. No. 88, 88 L.R.R.M. 1342 (1975); *General Electric Co.*, 80 N.L.R.B. No. 90, 23 L.R.R.M. 1094 (1948). In the latter decision, the Board stated (23 L.R.R.M. at 1095):

It is axiomatic that the Respondent [Employer] is not required under the Act [NLRA] to finance an economic strike against it by remunerating the strikers for work not performed.

This Court's observations in *Super Tire*, when viewed as they should be in the light of the established and controlling precedents in the area, call for summary reversal of the decision below on the ground that it is clearly erroneous.

That the Supreme Court of New Mexico decided as important an issue as is presented in this case and disposed of the applicability of the powerful federal labor law preemption doctrine in a ten-line footnote—without the benefit of any discussion of its underlying rationale, of the legal bases it relied upon, or of this Court's labor preemption decisions—further supports the conclusion that a summary reversal is appropriate here.

Leading to the same conclusion is this Court's recent decision in *Wisconsin*. For the labor preemption principles

discussed therein⁷ clearly control the outcome of this case and require reversal of the decision below. This Court has summarily reversed in cases which it believed to be controlled by one or more of its own recent decisions. *E.g.*, *United States v. Haley*, 358 U.S. 644 (1959); *Schackman v. California*, 388 U.S. 454 (1967). It is respectfully suggested that, at the very least, the *Wisconsin* decision requires that the decision herein below be vacated with a remand for reconsideration in light of the principles stated therein. *Cf. Norton v. Weinberger*, 418 U.S. 902 (1974); *Sutherland v. Illinois*, 418 U.S. 907 (1974).

II.

Abundant factual proof of the inherent conflict between unemployment compensation for strikers and free collective bargaining has either been adduced or is expected to be adduced in cases presently pending before the federal courts. In no event should the decision on this appeal preclude or prejudice intermediate and ultimately final review of those cases and the factual records made therein.

As previously noted, the preemption issue posed on this appeal was the subject of a decision reached after a plenary trial on the merits in only one federal court case involving the payment of unemployment insurance benefits to strikers.

⁷ For example, in discussing what is forbidden to the States in legislating on matters which might affect labor relations, this Court remarked in its recent *Wisconsin* decision that a state "may not add to an employer's federal legal obligations in collective bargaining. . . ." 44 U.S.L.W. at 5030. The increased financial burdens on employers directly flowing from the payment of unemployment benefits to his striking employees, we submit, impermissibly adds to the employer's obligations in collective bargaining.

Hawaiian Telephone, supra. The trial in that case covered approximately seven days and involved extensive testimony by employer representatives, union officials and expert witnesses. Substantial documentary evidence was amassed on the issue of the impact of the availability and payment of benefits on collective bargaining and strikes. For example, one union document in evidence, issued after the strike in that case, viewed the company's court challenge to the Hawaiian law as an "*attempt to undermine our [the union's] ability and right to strike in the future*" and called upon the membership to make sure that the court action "*doesn't cripple their own strikes in the future*." Quoted in *Hawaiian Telephone*, 405 F. Supp. at 281-82.

After a thorough review of the documentary evidence as well as the testimony of both lay and expert witnesses on the issue of the law's impact on collective bargaining, the court summarized its factual findings as follows:

From the preceding, as well as the facts found in this court's prior decision, this court finds: (1) 16.1% of total man-days lost are attributed to strikes in which compensation was paid; (2) the presence of potential unemployment benefits probably tends to lengthen strikes; (3) the employer's approach to bargaining is affected by the potential additional tax burden; (4) potential increases in tax contributions tend to make employers settle when they otherwise would not; (5) unions are given access to valuable confidential information about the success of strikes during the course of state administrative hearings on benefits;⁸ the ap-

⁸ Under both Hawaii's and New Mexico's laws the employer may be required in a labor dispute to supply information concerning the extent of its operations, if any, during the labor dispute.

peability of those hearings is used as a bargaining chip; (6) employee finances are key determinants of the success of strikes and strike threats; (7) unemployment benefits, if granted, provide a large percentage of striking workers' take-home pay; (8) union members and officials perceive that unemployment benefits contribute to their ability to strike and maintain it. Therefore, this court finds that Hawaii's unemployment insurance statute as interpreted by the Hawaii Supreme Court palpably affected the labor relations between TELCO and the IBEW, and similarly affects all other Hawaii employers and unions in every collective bargaining conflict and "is a factor lurking in the background of every incipient labor contract"⁴⁴ where the employer may desire to carry on business during a strike. [405 F. Supp. at 282]

⁴⁴ *Super Tire Eng. Co. v. McCorkle*, 416 U.S. 115, 124 (1974).

Thus the trial in *Hawaiian Telephone* served only to confirm the existence of substantial impact along the very lines suggested in this Court's observations in *Super Tire*, quoted herein at pp. 15-16, *supra*.

This led the *Hawaiian Telephone* court to conclude that the availability and payment of unemployment insurance to strikers under Hawaii's law contravenes the Supremacy Clause of the United States Constitution. For "[o]n its face . . . Hawaii's statute irreconcilably intrudes into the federal process of free collective bargaining" and clearly frustrates Congress' scheme that the collective bargaining process must be free from state interference. 405 F. Supp. at 290.

These conclusions, we submit, are equally applicable to the virtually identical New Mexico law here involved.

Grinnell's call for a detailed evidentiary hearing also provided the basis for the denial of defendant's summary judgment motion in the *New York Telephone* case, *supra*. That case thereupon came to trial on this issue and is now *sub judice*. The trial there consumed nine trial days wherein plaintiffs, through lay and expert witnesses and through extensive documentary evidence, followed the evidentiary criteria for proving impact suggested in the *Grinnell* case.⁴⁵

In the *New York Telephone* case the evidence showed, for example, that unemployment benefits in New York were paid to strikers, during the period 1965 through 1974, in approximately 14% of all strikes, which involved in excess of 50% of the total man-days lost in New York due to strikes. It was stipulated by the parties in that case, moreover, that upwards of 48.5 million dollars in benefits were paid to some 33,500 strikers during the seven-month strike which precipitated that lawsuit, directly resulting in a cost to the employers there of approximately 18 million dollars in unemployment insurance tax payments in 1972

⁴⁵ On the issue of impact, alone, plaintiffs called three expert witnesses and one lay witness, offered in evidence some 411 documents and submitted for the court's consideration a ten-year statistical study on the impact of unemployment insurance in lengthening strikes in New York State and Rhode Island and a survey of the attitudes of the full-time work force in New York State on the subject of unemployment compensation for strikers. Defendants called eight expert witnesses and introduced into evidence 126 exhibits. That the New York statute there under challenge, as well as its counterpart in Rhode Island, "could have more impact on the bargaining process than does the New Mexico law here" was recognized by the Solicitor General in his brief on this appeal (p. 8, n. 6).

and 1973 alone, in excess of what would have been due and payable if no benefits had been paid to their striking employees.¹⁰

Written statements emanating from the union leadership in the New York Telephone strike, and received in evidence at the trial, (a) stated that "the fact that more than 80% of the [union] membership stayed together for 218 days [on strike] is simply incredible" and in the judgment of the union's Vice President "it is a testimonial to three phenomena," of which the second (after the "dedication and spirit of the strikers") was "Unemployment Insurance," (b) described unemployment insurance as their [the strikers'] "strike weapon" and the company's lawsuit challenging the legality of such benefits to strikers as "an attempt to undermine any future strike effort," and (c) declared during the course of the strike that "New York State Unemployment Compensation is a tremendous assist to our members."¹¹

Other cases involving challenges to state laws granting unemployment insurance benefits to strikers are *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir. 1973), cert. denied, 414 U.S. 858 and 414 U.S. 879 (cross-motions for preliminary injunction and for dismissal of the complaint denied); *Westinghouse Broadcasting Co. v. Commonwealth of Massachusetts*, Civil Action No. 76-1409-S (D. Mass., Apr. 26, 1976) (motion for temporary restraining order denied); *Dow Chemical Co. v. Taylor*, 57 F.R.D. 105 (E.D. Mich. 1972) (motion to dismiss denied); and *Shell Oil Co. v. Brooks*, No. C. 74-1935 (W.D. Wash.) (cross-motions for summary judgment pending).

The First Circuit in *Grinnell* reversed the decision of the district court below which had granted defendants' motion to dismiss the complaint and had denied a preliminary injunction requested by the employer. Holding that it could not decide the case as a matter of law on the record before it, the court remanded it with instructions to conduct a full hearing ("a macroeconomic inquiry") into the federal preemption issues outlined in its opinion. Since "unambiguous congressional intent" is lacking, the court concluded, the district court must consider whether the payment of unemployment compensation "palpably infringes" on the federal labor policy and, if such infringement is found, whether the state's interest "in cushioning the impact of unemployment" is stronger than the federal interest in "untrammeled collective bargaining." The court thereupon suggested the type and extent of evidence it felt was appropriate in a trial of these issues.¹² At the writing of this brief, the *Grinnell* case has not come to trial.

The *Dow* decision (denying defendants' motion to dismiss) was cited with approval and relied on by the First Circuit in *Grinnell* to support the employer's federal pre-emption cause of action against the motion to dismiss

¹⁰ The imposition on the employer of the cost of the unemployment insurance subsidy for the strikers led the *Hawaiian Telephone* court in that case to remark: "The strikers' position when a strike is called, with the State's assist, becomes one of 'heads I win, tails you lose'!" 405 F. Supp. at 290.

¹¹ These are but a few examples of the extensive documentary evidence on this subject which is part of the record evidence in the *New York Telephone* case. A few of the many examples of union statements in strikes other than the telephone strike are excerpted and set forth for the Court's convenience in an appendix to this brief. They include statements by Joseph Moloney and J. W. Abel, as representatives of the United Steelworkers of America, and by the United Automobile Workers.

¹² The court called for statistical evidence on strike duration and attitudinal and opinion surveys, among other proofs of impact.

therein. The *Dow* court, after noting jurisdiction, concluded (1) that the legislative history provided no definitive statement of congressional intent and (2) that the court could not decide the infringement issue as a matter of law on the pleadings before it. This case is expected to be tried before the year's end.

The inadequacy of the record before it was also the basis for the recent decision (April 26, 1976) of a federal district court in Massachusetts in the *Westinghouse Broadcasting* case. There the court denied the employer's motion for a temporary restraining order to enjoin the continued payment of unemployment compensation to strikers (under a statute similar to the Hawaiian and New Mexican statutes) on the ground that the First Circuit's opinion in *Grinnell* required a detailed evidentiary hearing on the issue of infringement.¹³

The influence of unemployment insurance on collective bargaining is, we submit, wide-spread and ever-growing. Two states grant benefits outright in all strikes after a waiting period of seven or eight weeks (Rhode Island and New

¹³ The inadequacy of the record also led a state court in Pennsylvania to reject an employer's challenge on federal preemption grounds to the payment of unemployment compensation to employees locked out during a labor dispute. *Unemployment Compensation Board of Review v. Sun Oil Co. of Pa.*, 338 A.2d 710, 90 L.R.R.M. 2485 (Pa. Comm. Ct. 1975) cert. granted by Sup. Ct. of Pa. and case pending briefing and oral argument. The court there concluded that Sun Oil's argument "sounds plausible but it lacks evidentiary support," noting that this was probably explained by the failure of the company to raise the preemption issue below. In the face of a barren record, a Louisiana state court has also declined the opportunity to invalidate the payment of benefits during a lockout in *National Gypsum Co. v. Louisiana Dept. of Employment Security*, 313 So. 2d 527 (La. Sup. Ct. 1974), appeal dismissed for want of properly presented federal question, 423 U.S. 1009 (1975).

York) and some 29 states have laws similar to those of New Mexico and Hawaii which grant benefits, without an extended waiting period, but solely where the employer operates during the strike.

Before leaving this discussion of the pending unemployment insurance labor preemption cases, it should be emphasized, that the *Hawaiian Telephone* decision (now on appeal to the Court of Appeals for the Ninth Circuit) is not the first case in which a court has nullified state eligibility requirements for unemployment insurance benefits because they clashed with the federal labor policy. Indeed, this Court did so in *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967).

CONCLUSION

For the foregoing reasons, exercise of the Court's power to order summary reversal is amply warranted here. Should the Court conclude, however, that summary reversal is inappropriate because of the absence of a fully developed record on the issue of impact, or for any other reason, it should, we urge, dispose of this case in a manner which preserves for consideration by the courts below and, ultimately, by itself, in other cases having appropriately complete records, the generic labor preemption question here presented.

This Court recently so preserved the preemption issue involved in the *National Gypsum* case (see p. 24, n. 13, *supra*) by qualifying its dismissal there with the words "for want of a properly presented federal question." And, in *Rescue Army v. Municipal Court*, 331 U.S. 549, 575

(1947), this Court dismissed an appeal, after briefing and argument, since the federal constitutional issues were found to "come to us in highly abstract form."

Respectfully submitted,

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APPENDIX

APPENDIX

Statements of Union Officials Concerning the Impact of Unemployment Insurance.

REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON INDUSTRIAL AND LABOR RELATIONS for the Year 1959-1960, Legislative Document (1960) No. 32, pp. 224-27, Statement of Joseph Molony, on Behalf of the United Steelworkers of America:

[I]f he [a striker] were denied these [unemployment insurance] benefits then it is not to be unexpected if such people might easily become public charges because the average working man in our State is unable to accumulate sufficient savings to carry him for any extended period of . . . strike. So, it is conceivable that he might become a public charge. Then . . . the employer might also conceivably be relieved of some taxation but the people of the entire State would then be subject to taxation to assist these people who were in distress as a result of . . . strike.

So I'm here to express to you and to your distinguished colleagues the feelings of the membership of my union, and the feelings I do believe as expressed by Mr. Corbett of all of labor that we are unalterably opposed to denying a striker unemployment insurance.

* * * * *

If . . . we must renew the strike. . . . [t]hen it would be a disaster. . . . It would be damaging beyond description to the Steelworkers Union if the State Legislature . . . denied our membership the right to unemployment insurance.

U.S. NEWS AND WORLD REPORT, October 3, 1960, article, "116 DAYS ON STRIKE—45 MILLIONS IN PUBLIC AID," quoting statements of I. W. Abel, then Secretary-Treasurer (now President) of the United Steelworkers of America, at that union's 1960 national convention, concerning the union's 1959 strike:

It is Mr. Abel's estimate that about 45 million dollars in relief and unemployment benefits was obtained from public agencies in that strike. This aid, in his words, "provided the food, shelter and welfare services that made the strike endurable. The sum exceeded by far the amount that the union poured into the districts and the locals. Had the union not secured assistance for its members from these agencies, the union's treasury would have been much more severely depleted."

* * * * *

"Public assistance agencies vary widely from State to State, both in the adequacy of legal coverage and the reasonableness with which local welfare officials . . . grant assistance. As in the case of unemployment compensation, adequate public-assistance standards are only secured by political activity. Once secured, they must be continually watched so that public officials continue to administer the laws fairly."

* * * * *

The New York experience, Mr. Abel said, offers a political lesson for his members in other states. He reported: "This staggering sum [9 million dollars in unemployment insurance benefits] of assistance to our

striking members in New York clearly demonstrates the need for political activity to legislate humane and fair unemployment-compensation laws."

UAW AMMUNITION, June 1957, article, "INDUSTRIAL UNIONS ADAPT TO THE AGE OF AUTOMATION":

[T]he union's leadership decided to take advantage of the unemployment compensation law and called the tool and die workers out on strike alone.

Then under the law, production workers, who got laid off as the result of the shut downs which would certainly follow, would be entitled to unemployment compensation.

This was planned to exert pressure on GM, since it would be caught tooling up for a new model. The production workers, it was foreseen, would be relatively cushioned by unemployment compensation payments. Thus, a double set of facts made the strike strategy effective.

The unemployment compensation law then (since the law has been amended so the situation does not apply) allowed workers in a plant on strike to collect unemployment compensation if they were not parties to the dispute.

* * * * *

As the strike began to bite, GM started to close down all over the country. The laid off production workers then collected their compensation. At the same time they thronged to picket lines to support the skilled workers' strike.

No. 75-1452

AUG 20 1976

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

KIMBELL, INC., D/B/A FOODWAY, FURR'S, INC., SAFEWAY STORES, INC., AND SHOP RITE FOODS, INC., D/B/A PIGGLY WIGGLY, APPELLANTS

v.

EMPLOYMENT SECURITY COMMISSION OF THE
STATE OF NEW MEXICO, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEW MEXICO

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1452

KIMBELL, INC., D/B/A FOODWAY, FURR'S, INC., SAFE-WAY STORES, INC., AND SHOP RITE FOODS, INC.,
D/B/A PIGGLY WIGGLY, APPELLANTS

v.

EMPLOYMENT SECURITY COMMISSION OF THE
STATE OF NEW MEXICO, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEW MEXICO

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted pursuant to the Court's order of June 1, 1976, inviting the Solicitor General to express the views of the United States in this case. The question presented is whether New Mexico's limited grant of unemployment compensation benefits to strikers is in conflict with, and thus precluded by, federal labor law. In our view it is not, and the appeal should be dismissed for want of a substantial federal question.

(1)

STATEMENT

The appellants are operators of retail food stores in various New Mexico communities who are members of a multi-employer bargaining unit which negotiates with the Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local 391 (the Union). During bargaining negotiations in October 1971, the Union informed appellants that, if negotiations did not culminate in a new agreement by the time the old contract expired, it would strike them one by one until they capitulated to its demands. On October 23, 1971, when the meat department employees of one member of the unit struck, the other members of the unit locked out their meat department employees to prevent "whipsaw" strikes. As a result, all union employees of the meat departments were out of work from October 23, 1971, to December 4, 1971, when the strike was settled by execution of a new agreement. During that period the meat departments continued to operate with temporary replacements (J.S. 4-6).¹

During the strike 226 meat department employees filed claims for unemployment compensation (J.S. 6). The New Mexico Unemployment Compensation Law, 1953 N. M. Stat. Ann. Sections 59-9-1 to 59-9-29 (2d Repl., 1974), disqualifies an applicant for benefits whose "unemployment is due to a stoppage of work which exists because of a labor dispute * * *." Sec-

¹ "J.S." refers to the Jurisdictional Statement.

tion 59-9-5(d).² The New Mexico Unemployment Security Commission, on June 21, 1972 (some 6 months after the strike was settled), found that the strike did not substantially interfere with business operations, and thus did not amount to a "stoppage of work" within the meaning of Section 59-9-5(d). The Commission therefore awarded unemployment compensation benefits to the claimants, totaling \$47,459. (J.S. 6; Motion to Dismiss 3.)

The New Mexico District Court for the Second Judicial District reversed the Commission, holding, *inter alia*, that the payment of unemployment compensation to the claimants would interfere with federal labor policy (J.S. 7-8). The Supreme Court of New Mexico reversed the district court (J.S. App. 3a), citing its decision in *Albuquerque-Phoenix Express, Inc. v Employment Security Commission*, 544 P. 2d 1161, 88 N. M. 596 (J.S. App. 4a-20a), which had been handed down five days earlier. In that case

² The New Mexico Act has been approved by the Secretary of Labor pursuant to the Federal Unemployment Tax Act, 68A Stat. 439, as amended, 26 U.S.C. 3301, et seq. That Act imposes a national payroll tax on employers against which credit is allowed for payments made to qualifying state funds. The federal law provides that state laws which require recipients to accept new work cannot deny eligibility to persons who refuse to accept such work because (1) the position offered is vacant due to a labor dispute, (2) the wages offered are less than those prevailing in the area, (3) membership in a company union or resignation from a bona fide union is a condition of employment. 26 U.S.C. 3304 (a)(5). State laws which meet these and the other conditions specified in Section 3304(a) "shall" be approved by the Secretary of Labor "within 30 days of submission."

the court had held that the phrase "stoppage of work" in the state law refers to a cessation or substantial curtailment of the employer's business activities, rather than to a cessation of any given claimant's labor.³ Accordingly, since the strike there (as here) had not resulted in such a cessation or substantial curtailment, the striker-claimants were entitled to unemployment compensation. The court in *Albuquerque-Phoenix* had also noted that, contrary to the recent federal district court decision in *Hawaiian Telephone Company v. State of Hawaii Department of Labor*, 405 F. Supp. 275 (D. Hawaii), concerning Hawaii's unemployment benefits, it did not consider payment of unemployment compensation pursuant to New Mexico law to be an encroachment on federal labor policy; it emphasized that the employee is eligible for such compensation only if he is "available for, and actively seeking work" (J.S. App. 11a, n. 1).

³ Most state unemployment compensation laws are patterned on a draft bill prepared by a committee of the Social Security Board in 1936. That bill, in turn, was patterned after British unemployment compensation legislation which contained a "stoppage of work" disqualification. See Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. Chi. L. Rev. 294, 295, 307-308 (1950); *Unemployment Benefits—"Stoppage of Work,"* 61 ALR 3d 693, 696. The laws of 30 states contain such a disqualification. Twelve additional states disqualify applicants whose unemployment is due to a labor dispute "while the dispute is in active progress." *Comparison of State Unemployment Insurance Laws*, United States Department of Labor, Bureau of Employment Security, BES Publication No. U-141, ET-13 (1965). The New Mexico interpretation of the "stoppage of work" clause—as referring to a substantial stoppage of the employer's operations—is in accord with the majority view. 61 ALR 3d, *supra*, at 697-704, 705; Shadur, *supra*, 17 U. Chi. L. Rev. at 307-310. See also *infra*, p. 9, n. 7.

DISCUSSION

1. Appellants contend that the State's grant of unemployment compensation to strikers disturbs the balance of power between employers and unions which Congress struck in the National Labor Relations Act and thus is barred by the Supremacy Clause of the federal Constitution (J.S. 9-15). The Supreme Court of New Mexico properly rejected this contention.⁴

a. The preemption issue initially turns on Congress' intent when it enacted and subsequently amended the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the Social Security Act, Title IX, 49 Stat. 639, as amended by the Federal Unemployment Tax Act, 68A Stat. 439, 26 U.S.C. 3301, *et seq.* The history of those Acts shows that Congress concluded that a uniform policy on the payment of unemployment compensation to strikers was not essential to the federal regulatory scheme, and thus elected to leave this matter to the judgment of each State.

As the First Circuit noted in *Grinnell Corp. v. Hackett*, 475 F. 2d 449, 454, certiorari denied, 414 U.S. 858:

In July 1933, the Federal Emergency Relief Administration (FERA) ruled that it would not "attempt to judge the merits of labor disputes" but would treat unemployed strikers like all other unemployed persons for purposes of relief. * * * This policy became a bone of contention during the textile strike of September

⁴ It did so, as we have shown, virtually without discussion.

1934. * * * Congress could hardly have been unaware of this policy when in 1935 it passed in close succession both the National Labor Relations Act, * * * and the Social Security Act * * *, Title IX of which * * * is now the Federal Unemployment Tax Act * * *. [Citations omitted.]

In neither statute, however, did Congress attempt to preclude the states from exercising their own judgment as to payments to striking workers. Not only did the Social Security Act establish standards for state programs which did not contain any disqualification for strikers benefits (*supra*, p. 3, n. 2)⁵; but also, within a few years of its enactment, the Secretary of Labor, pursuant to 26 U.S.C. 3304(a), approved four state laws which allowed payments to strikers (*Grinnell, supra*, 475 F. 2d at 454-455).

Moreover, in 1947 the Hartley Bill, passed by the House, provided that a striker who accepted unemployment compensation benefits would no longer be considered an "employee" under the National Labor Relations Act (H.R. 3020, 80th Cong., 1st Sess., Section 2(3) (1947)), and thus would lose all rights under the Act, because such benefits were "a perversion of the purposes of the social security laws." H.R. Rep. No. 245, 80th Cong., 1st Sess. 12 (1947). In

⁵ Indeed, that Congress considered this a proper matter for local determination is shown by the fact that in 1935 Congress also enacted the District of Columbia Unemployment Compensation Act, 49 Stat. 946, *et seq.*, which denied benefits to any individual unemployed as a result of a "labor dispute still in active progress." Section 19(a)(6), 49 Stat. 950. That provision is still in effect. 46 D.C. Code 310(f).

conference, however, the provision was dropped without explanation.

Finally, in 1969, the House, which was conducting hearings on legislative proposals to amend the Social Security statutes, rejected President Nixon's proposal that strikers be deemed statutorily ineligible for such benefits. House Committee Chairman Wilbur Mills explained:

We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people. * * *

For example, there are two States * * * which will pay unemployment benefits when employees are on strike * * *. * * * [I]f the State wants to do it we believe they ought to be given latitude to enable them to write the program they want. [115 Cong. Rec. 34106 (1969).]

Moreover, where Congress has wanted to set federal standards governing access of strikers to unemployment benefits, it has done so. Thus, the Railroad Unemployment Insurance Act (7 Stat. 1094, as amended, 45 U.S.C. 351, *et seq.*) provides that only participants in unlawful strikes may be denied benefits. 45 U.S.C. 354(a-2)(iii). Congress also amended the Food Stamp Act (78 Stat. 703, as amended, 7 U.S.C. 2011, *et seq.*), in 1971, to prohibit states from denying food stamps to strikers. 7 U.S.C. 2014(e). Furthermore, Congress' stated reason for rejecting a provision denying such aid to strikers was its determination not "to take sides in labor disputes." H.R. Rep. No. 91-1402, 91st Cong., 2d Sess. 11 (1970).

In sum, it is apparent that Congress over the years has been aware of disparate attitudes in the states as to the advisability of allowing strikers access to unemployment benefits and has decided to permit the diversity to continue. Cf. Section 14(b) of the National Labor Relations Act, 29 U.S.C. 164(b).⁶

b. Even if, as the First Circuit held in *Grinnell*, it were necessary to weigh possible harm to the collective bargaining process from paying unemployment compensation to strikers against the State's interest in making such payments to determine whether federal

⁶ The First Circuit in *Grinnell*, *supra*, considered the legislative history ambiguous, apparently because of the lack of any explicit congressional enactment on the subject of unemployment benefits for strikers. 475 F. 2d at 456-457. The court held that the validity of Rhode Island's policy of paying such benefits should be determined by balancing the interference with the federal policy of collective bargaining against the competing demands of state policy. Finding insufficient evidence in the record to make this determination, the court remanded the case to the district court for further proceedings. *Id.* at 459-461. (To the same effect see *Dow Chemical Co. v. Taylor*, 57 F.R.D. 105, 108 (E.D. Mich.).)

In our view the remand was unnecessary because the legislative history is not ambiguous as to Congress' lack of preemptive intent. Cf. *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 239-243; *Bethlehem Steel Co. v. New York Board*, 330 U.S. 767, 772-773. In any event, the Rhode Island law involved in *Grinnell* could have more impact on the bargaining process than does the New Mexico law here. It does not have a "work stoppage" exception, but rather provides unemployment compensation for all strikers, after a specified waiting period. See discussion *infra*, pp. 8-9.

In *Hawaiian Telephone Company*, *supra*, the district court, following the lead of *Grinnell*, also found the legislative intent to be unclear. 405 F. Supp. at 285-289. The court held that Hawaii's policy of paying unemployment compensation to strikers impermissibly interfered with the federal process of collective bargaining. For the reasons stated above, we believe that decision to be erroneous.

labor policy was violated, it seems clear that New Mexico's policy of awarding unemployment benefits to strikers would pass the test. As noted (*supra*, p. 4), the New Mexico law permits compensation to strikers only where no "stoppage of work" results from their efforts, and the Supreme Court of New Mexico has interpreted that phrase to mean a work stoppage which results in a substantial curtailment of the employer's operations.⁷ Thus, the New Mexico law does not provide the strikers with an expectation of payment upon which they could rely in planning their strategy; indeed, the condition under which compensation may be paid runs directly counter to the employees' strike objective of imposing as substantial an impact on the employer's business operations as possible.⁸ And, any influence which the award of unemploy-

⁷ The New Mexico interpretation is in accord with the recommendation of the United States Department of Labor, Bureau of Employment Security. Its publication, *Unemployment Insurance Legislative Policy, Recommendations for State Legislation 1962* (BES Publication No. U212A, October 1962), states (p. 70):

"Some States have had, and still do have, a limited disqualification period for unemployment due to a labor dispute. Since most disputes do not last as long as the 6 or 7 weeks plus waiting period specified in those State laws, such provisions have little effect on the length of the disqualification. However, the payments of benefits to strikers represents a departure from the program's traditional policy of neutrality in labor disputes. *The Bureau recommends that the labor-dispute disqualification continue, in general, as long as the labor dispute causes a substantial stoppage of the employer's work.*" [Emphasis added.]

⁸ "In its history of adjudicating the applicability of the labor dispute disqualification provision of the New Mexico Unemployment Compensation Statute, the Employment Security Commission of New Mexico has awarded benefits to claimants whose unemployment was due to a labor dispute in only three cases * * *" (Motion to Dismiss 3).

ment benefits could have had on the relative economic strength of the parties in this dispute is further minimized by the fact that the Employment Security Commission did not make its award until the strike had been over for 6 months.⁹

2. A final factor militating against plenary review in this case is that there is no conflict of decisions requiring resolution by this Court. *Grinnell, supra*, while calling for a weighing of federal and state interests, did not find that the state statute conflicted with the federal statute but merely remanded the case for further proceedings. *Hawaiian Telephone, supra*, if it conflicts with the decision below, is in any event a district court decision, which is now on appeal to the Ninth Circuit. The issue is also being litigated in other cases.¹⁰ In the absence of a conflict of appellate de-

⁹ In the context of back pay awards, this Court has upheld the Board's long practice of treating unemployment compensation as an incidental benefit, not to be considered in computing such awards. *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 365. In *Gullett*, the Court, referring to the House provision of the Hartley Bill which was rejected in 1947 (*supra*, p. 6), added that the Board's practice regarding unemployment compensation was known to Congress when it enacted the Taft-Hartley amendments. "Under these circumstances it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal [Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e)], Congress accepted the construction placed thereon by the Board and approved by the courts." *Id.* at 366. The same can be said in the present context.

¹⁰ E.g., *New York Telephone v. New York State Department of Labor*, pending decision, S.D.N.Y., 73 Civ. 4557.

See also *Unemployment Compensation Board of Review v. Sun Oil Co. of Pa.*, 338 A.2d 710, 715-717 (Pa. Comm. Ct.) (rejecting the contention that the Pennsylvania law awarding unemploy-

cisions, however, we see no need for plenary review by this Court.

CONCLUSION

For the reasons set forth above, the appeal should be dismissed for want of a substantial federal question.

Respectfully submitted.

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AUGUST 1976

ment compensation to employees locked out during a labor dispute upsets the balance of power because it increases the employer's tax rate and diminishes the impact on employees of being out of work); *National Gypsum Co. v. Administrator, Louisiana Department of Employment Security*, 313 So. 2d 230, 234 (La. Sup. Ct.), appeal dismissed, 423 U.S. 1009 (sustaining an award of unemployment compensation to employees locked out during a labor dispute). Cf. *ITT Lamp Div. v. Minter*, 435 F.2d 989 (C.A. 1), certiorari denied, 402 U.S. 933; and *Super Tire Co. v. McCorkle*, 412 F. Supp. 192 (D. N.J.) (rejecting the contention that state payment of welfare benefits to strikers impermissibly alters the balance of power between labor and management).

Questions concerning the eligibility of strikers for welfare benefits are presently pending before this Court on petitions for writs of certiorari in *Batterton v. Francis* (No. 75-1181) and *Chamber of Commerce v. Francis* (No. 75-1182).

Supreme Court, U. S.
FILED

SEP 4 5 1976

JAMES RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1976

No. 75-1452

KIMBELL, INC., d/b/a FOODWAY,
FURR'S, INC., SAFEWAY STORES, INC., and
SHOP RITE FOODS, INC., d/b/a PIGGLY WIGGLY
Appellants,

vs.

EMPLOYMENT SECURITY COMMISSION
OF THE STATE OF NEW MEXICO
and

LANA JEAN NOLAN, *et al.*,
Appellees.

On Appeal From The Supreme Court Of The
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SUPPLEMENTAL BRIEF IN RESPONSE TO
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AMICUS CURIAE

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In the Supreme Court of the United States

In the Supreme Court of the United States
October Term, 1976
No. 75-1452

KIMBELL, INC., d/b/a FOODWAY,
FURR'S, INC., SAFeway STORES, INC., and
SHOP RITE FOODS, INC., d/b/a PIGGLY WIGGLY

Appellants,

vs.

EMPLOYMENT SECURITY COMMISSION
OF THE STATE OF NEW MEXICO

and

LANA JEAN NOLAN, *et al.*,

Appellees.

On Appeal From The Supreme Court Of The
State Of New Mexico

SUPPLEMENTAL BRIEF IN RESPONSE TO
MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE

INTRODUCTION

Appellants herein respectfully present this brief in response to the Memorandum for the United States as *Amicus Curiae* submitted by the Solicitor General pursuant to this Court's order of June 1, 1976, inviting the Solicitor General to express the views of the United States in this case.

SUMMARY OF ARGUMENT

The Solicitor General's view that legislative history demonstrates Congressional intent to leave to the states the decision whether to pay unemployment compensation to employees engaged in a labor dispute is at odds with reported case authority and is erroneous. Likewise, the Solicitor General's assertion that New Mexico's interest in paying unemployment compensation benefits to strikers outweighs any harm which such payments might do to the collective bargaining process is not supported by the record or the law.

The Solicitor General erroneously asserts that there is no conflict of decisions requiring resolution by this Court. Indeed, there is a direct conflict between the view of the Supreme Court of New Mexico, as enunciated by the Solicitor General, and federal court decisions. That there are few conflicting decisions on the issue in this case should not be determinative as to whether this Court should grant plenary review. The issue raised has been thoroughly discussed in reported cases and commentaries. The record is adequate for review and the issue is too important to be disposed of in summary fashion. Substantial interest shown by briefs as *amicus curiae* and the confusion on this issue in cases decided in the lower courts and in pending cases suggests a need for resolution of the issue.

DISCUSSION

A. Legislative History Does Not Establish Congressional Intent to Leave to State Governments the Discretion to Permit Payment of Unemployment Compensation Benefits to Strikers.

The Solicitor General argues that the legislative history of the National Labor Relations Act, 49 Stat. 449, *et seq.*, as amended, 29 U.S.C. §151, *et seq.*, and the Social Security Act, 49 Stat. 620, Title IX of which, 49 Stat. 639-45, is now the Federal Unemployment Tax Act, 26 U.S.C. §3301, *et seq.*, together with Congressional action in analogous programs

indicate Congressional intent to leave to the states the judgment whether to pay unemployment compensation benefits to strikers. (U.S. Mem. at 5-8).¹ In this conclusion, the Solicitor General and, implicitly, the Supreme Court of New Mexico stand alone.

In only two reported decisions have courts attempted to ascertain Congressional intent by tracing Congressional history. After an exhaustive review of the relevant history, the First Circuit in *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir. 1973), *cert. denied*, 414 U.S. 858 (1973), noted that "the existing legislative record is not sufficiently clear to establish Congressional intent either way", 475 F.2d at 454, and concluded that "unambiguous Congressional intent is lacking." 475 F.2d at 457. *Accord, Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F. Supp. 275, 285-86 (D. Hawaii 1975). In its brief as *amicus curiae* submitted herein, at page 13, the Chamber of Commerce of the United States cites several unreported cases in addition to the *Grinnell* and *Hawaiian Telephone* decisions, in all of which the courts have concluded that the legislative history is ambiguous. The courts are, thus, unanimous in this conclusion.

Each of the supposed indicia of Congressional intent on which the Solicitor General focuses in his Memorandum has been considered and rejected by the courts. First, the Solicitor General emphasizes that within a few years of the enactment of the Social Security Act the Secretary of Labor approved four state laws which allowed payment of unemployment compensation benefits to strikers. (Mem. U.S. at 6). However, such action is immaterial since under the provisions of 68A Stat. 443, 26 U.S.C. §3304(a) approval is *mandated* if certain minimum requirements set forth in that section are met. *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F. Supp. at 285. Subsection (5)(A)

¹ "Mem. U.S." refers to the Memorandum for the United States as *Amicus Curiae*.

provides that a plan for payment of unemployment compensation benefits will not be approved which denies compensation to "any otherwise eligible individual for refusing to accept new work...if the position offered is vacant due directly to a strike, lockout, or other labor dispute...." 68A Stat. 443, 26 U.S.C. §3304 (a) (5) (A). Thus, the provision is not related to payment of unemployment compensation benefits to employees who leave their work as a result of a strike.

Next, the Solicitor General points to the fact that a 1947 amendment to the Taft-Hartley Act was passed by the House providing that a striker who accepts unemployment compensation benefits would no longer be considered an "employee" under the National Labor Relations Act and thus would lose all rights under that Act. (Mem. U.S. at 6-7). The amendment, however, was directed at the unemployment compensation laws of Rhode Island and New York, which provide for payment of benefits to strikers after a certain specified waiting period, a fundamentally different approach from New Mexico's in the scope of its application. *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F. Supp. at 286. The amendment was removed without explanation in conference committee.

Given (the silence of the conference committee), the enormous political controversy surrounding the Taft-Hartley Act, and the consequent need for compromises, perhaps unreasoned or hasty, we cannot read this deletion and the subsequent approval of the conference bill as specific congressional resolution of the problem. *Grinnell Corp. v. Hackett*, 475 F.2d at 455.²

² It could also well be that Congress viewed this proposed provision as superfluous since it had enacted the National Labor Relations Act and Title IX of the Social Security Act in 1935, with the former being designed to define and protect the rights of *employed* workers and the latter being concerned with caring for the needs of the *unemployed*. Section 2(3) of the National Labor Relations Act, 49 Stat. 450, as amended, 29 U.S.C. §152(3), preserves "employee" status to strikers for the duration of a strike. To deprive those receiving unemployment compensation benefits during a strike of "employee"

The Solicitor General also relies upon certain remarks made by Representative Wilbur Mills in 1969 in connection with rejection by the House of certain amendments to the social security statutes proposed by President Nixon, including a proposal that strikers be deemed ineligible for such benefits. (Mem. U.S. at 7). Again, the purpose of that legislation was to negate the effect of the New York and Rhode Island unemployment compensation statutes. *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F. Supp. at 286. Indeed, from Congressman Mills' remarks one might conclude that he was under the impression that *only* two states paid unemployment compensation benefits to strikers and that he was not aware of the "stoppage of work" interpretation given the labor dispute qualification provision in the unemployment compensation statutes of a majority of the states which permits the payment of benefits to strikers. As the court in *Grinnell* observed:

We are aware of the importance and power of the House Ways and Means Committee and of the significance of its Chairman's statements on bills within its jurisdiction. Yet, in the absence of any floor amendment or debate related to that particular change in either house, and of any real consideration of the issue at any level in the Senate, we cannot take the House Committee's deletion, and Congress' subsequent approval of the substitute bill, as a clear indication of the intent of the entire Congress not to preempt unemployment payments to strikers. 475 F.2d at 456.

Finally, the Solicitor General attempts to divine Congressional intent to permit states full discretion in granting unemployment compensation benefits to strikers because in certain instances Congress has acted to grant or deny such status. This might thus have been thought unnecessary since so long as one is an "employee" he is logically not "unemployed" so as to be available for unemployment compensation benefits.

benefits in specific contexts. (Mem. U.S. at 6, n. 5). For example, in 1935 Congress enacted the District of Columbia Compensation Act which contained a provision denying unemployment compensation benefits to strikers. However, because of the relative political vacuum in which Congress acts in legislating for the District of Columbia, “at the most, one can conclude that Congress *might* have wished the District’s policy upon the states if it did not have to heed its several constituencies.” *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F. Supp. at 285.

The Solicitor General also finds significance in Congress’ limitation on the award of unemployment compensation benefits under the Railroad Unemployment Insurance Act in the event the unemployment is due to a strike. 52 Stat. 1094, *et seq.*, as amended, 45 U.S.C. §351, *et seq.*³ And, finally, the Solicitor General points to a 1971 amendment to the Food Stamp Act, 84 Stat. 2048, *et seq.*, 7 U.S.C. §2011, *et seq.*, requiring the Secretary of Labor to set up “uniform national standards of eligibility”, 84 Stat. 2049, 7 U.S.C. §2014(b). The Food Stamp Act, as amended, specifically requires a national standard for households with able-bodied adults who fail to accept employment but makes certain exceptions, including “refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout.” 84 Stat.

³ The disqualification provision contained in 45 U.S.C. §354 (a-2) (iii) is almost identical to the wording contained in the New Mexico labor dispute disqualification provision, §59-9-5(d) N. M. Stat. Ann. (Supp. 1975), which, as noted by the Solicitor General in note 3 at page 4 of his Memorandum, was patterned after a draft bill prepared by a committee of the Social Security Board. A substantially identical “stoppage of work” provision is contained in thirty state unemployment compensation statutes. However, in the Railroad Unemployment Insurance Act, Congress added an additional proviso that one is disqualified only if “the Board finds that (the) strike was commenced in violation of the provisions of the Railway Labor Act or in violation of established rules and practices of a bona fide labor organization.” 52 Stat. 1098, as amended, 45 U.S.C. §354(a-2) (iii). It might thus be argued that Congress viewed the language of the draft bill as imposing a blanket disqualification on all strikers from receiving unemployment compensation benefits unless the proviso further limiting the disqualification were added.

2049, 7 U.S.C. §2014(c).⁴

Faced with the same arguments concerning Congressional action in analogous situations, the First Circuit in *Grinnell* concluded:

The existence and interpretation of these provisions in analogous programs might be read as indicating a broad Congressional intent not to preempt payments to strikers under public assistance statutes. Yet, given the

⁴ The political considerations involved in denying unemployment compensation benefits to strikers and in depriving their children of food are obviously different. Also, the impact of the latter action on collective bargaining would be substantially different since food stamps are not financed by employer contributions.

The language of 7 U.S.C. §2014(c) is not a *grant* of food stamps to strikers but, rather, an exception from disqualification. As such, this section is identical in approach to 26 U.S.C. §3304(a), which provides that the Secretary of Labor shall approve a state law for unemployment compensation benefits so long as it meets certain minimum standards, including the provision not disqualifying “any otherwise eligible individual for refusing to accept new...work if the position offered is vacant due directly to a strike, lockout, or other labor dispute....” 68A Stat. 443, 26 U.S.C. §3304(a) (5) (A).

The Food Stamp Act, as originally enacted, was not generally understood by Congress to provide eligibility for strikers. See 116 Cong. Rec. 42,015 (1970) (remarks of Congressman Abritt). Nonetheless, since there was no express language denying payment of food stamp benefits to strikers, over the years more and more strikers were determined eligible to obtain such benefits. In 1968, 1970 and 1973-1974, Congress rejected efforts to disqualify strikers from receiving benefits under the Food Stamp Act. However, the rejections may have been premised more on a political trade-off between proponents of farm subsidies and opponents of the striker disqualification amendment than on the merits of the issue. Thus, with regard to the 1973-1974 amendment attempt, Senator Humphrey stated:

I simply say to my colleagues, if you want a farm bill, you must vote down (the striker disqualification) amendment (to the Food Stamp Act), because it will precipitate such a debate in the House that there will be no bill, and I say, most respectfully, we must have a farm bill. Our current farm laws expire this year. 119 Cong. Rec. 26,909 (1973); see also 114 Cong. Rec. 28,314 (1968), 116 Cong. Rec. 42,035 (1970).

ability of Congress to articulate that intent in other programs, one might also infer that its silence in the unemployment compensation statute was indicative of a contrary intent. That, too, however, is not a reasonable inference, given the pre-1935 policy, the 1935 Acts and the rejection of explicitly prohibitory legislation in both 1947 and 1969. *The most that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances.* 475 F.2d at 456-57. (Emphasis added).

B. The Absence of a Record Below Specifically Demonstrating the Quantum of Impact on Collective Bargaining Stemming from the Granting of Unemployment Compensation Benefits to Strikers Should Not Deter the Court from Plenary Review of this Case.

The Solicitor General questions whether the record below establishes that the awarding of unemployment compensation benefits would have a substantial impact upon the collective bargaining process. (Mem. U.S. at 8-10). Appellants submit that a detailed evidentiary record is immaterial to plenary consideration of the issues raised in this case, since *a priori* payment of unemployment compensation benefits to strikers can have only an adverse impact on the free collective bargaining structure established by Congress. It is, Appellants submit, beyond question that the prospect of monetary benefits would buoy the spirits and increase the determination of strikers or prospective strikers.

The erroneous notion that a detailed evidentiary record is required in a case such as this to establish the quantum of impact on the collective bargaining process was spawned by the First Circuit's analysis of the preemption doctrine in *ITT Lamp Division v. Minter*, 435 F.2d 989 (1st Cir. 1970), cert. denied, 402 U.S. 933 (1971) and perpetrated in the subsequent decision of that Court in *Grinnell Corp. v. Hackett, supra*. According

to the First Circuit, unless Congress has clearly manifested its intention to occupy the area, the court must balance the degree and relative importance of federal and state interests in applying the preemption doctrine where there is asserted conflict between state regulation and unfettered collective bargaining.

This Court has never employed a "balancing" process in applying the preemption doctrine. Indeed, it would seem clear from the Court's recent decision in *Machinists Union v. Wisconsin Employment Relations Commission*, 96 S. Ct. 2548 (1976), that the emergence of such an approach is not imminent. The inquiry, instead, is as to the outer limits of Congressional concern in preserving economic self-help as a legitimate weapon in the free play of economic forces in labor-management relations. As stated in the *Machinists Union* case:

Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 380, 96 S. Ct. at 2556-57.

The same reasoning is applicable where the exercise of plenary state authority assists one side or the other to survive the impact of the self-help measures.

Here, the conflict appears on the face of the state activity and an analysis of the quantum of impact is neither required nor in most cases possible. This Court needed no detailed evidentiary record in *Super Tire Engineering Co. v. McCorkle* to conclude that:

It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing

collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. The question, of course, is whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes. In this sense petitioners allege a colorable claim of injury from an extant and fixed policy directive of the State of New Jersey. That claim deserves a hearing. 416 U.S. 115, 124 (1974). (Footnotes omitted and emphasis added).

Similarly, in the *Machinists Union* case, without an evidentiary record, this Court observed with regard to the cease and desist order of the Wisconsin Employment Relations Commission that "there is *simply no question* that the Act's processes would be frustrated in the instant case were the State's ruling permitted to stand." 96 S. Ct. at 2557 (Emphasis added).

Abundant factual proof of the general impact of the payment of unemployment benefits to strikers is readily available. Although the District Court in *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F. Supp. at 277, expressed its doubt that an evidentiary hearing was required in view of the language in *Super Tire* quoted *supra*, it ordered a hearing nonetheless because it concluded that a hearing would "be of assistance in the ultimate resolution of the problem before this court." That hearing confirmed the existence of substantial impact. The brief as *amicus curiae* filed herein by the Chamber of Commerce of the United States indicates at pages 21 and 22 that similar evidence confirming the substantial impact of the payment of unemployment compensation benefits to strikers was adduced in the *New York Telephone* case.

The finding of the trial court in *Hawaiian Telephone* and the evidence adduced in the pending *New York Telephone* case only confirm the conclusion of the research study conducted by the Industrial Research Unit of the Wharton School of

Business at the University of Pennsylvania that "the availability of public support for strikers...increase(s) the propensity of unions to undertake strikes, and...increase(s) the probability that they will be longer, costlier, or both." . *A. Thieblot & R. Cowin, Welfare and Strikes, the Use of Public Funds to Support Strikes*, 217 (1972) (Footnotes omitted). In any event, in most cases there would be no way of adducing evidence to prove definitely whether payment of unemployment benefits would make a strike longer or costlier.

Specifically, the Solicitor General urges that application of the "stoppage of work" provision in the New Mexico striker disqualification section removes any substantial impact from payment of benefits since it does not "provide the strikers with an expectation of payment upon which they could rely in planning their strategy." (Mem. U.S. at 9).⁵ The facts in this case demonstrate beyond question that the strike imposed a severe economic burden on all of the employers and the receipt of \$47,459 in unemployment compensation benefits undoubtedly assisted the strikers to survive the impact of the strike. (Jurisd. Stat. at 5-6). Since the New Mexico Supreme Court interprets "stoppage of work" to refer to the employer's operation, the state would assist strikers only when they were unable to readily achieve their objectives through a successful strike, i.e., when public assistance would be vital to maintaining the strike.⁶ Strikers are disqualified only if there is a "stoppage of work" at the employer's premises. Thus, those engaged in successful strikes where the employer's business is

⁵ The genesis and evolution of the interpretation of the "stoppage of work" disqualification clause in the New Mexico statute and the statutes of most states is thoroughly discussed in *Hawaiian Tel. Co. v. State Dept. of Labor & Indus. Relations*, 405 F. Supp. at 287-88.

⁶ The Solicitor General emphasizes that in rejecting the decision of the federal district court in *Hawaiian Tel. Co. v. State Dept. of Labor & Indus. Relations*, *supra*, the Supreme Court of New Mexico stressed that even a striker is eligible for unemployment compensation benefits only if he is "available for, and actively seeking work". (Mem. U.S. at 4). It should be noted, however, that

totally shut down or severely curtailed would not be entitled to unemployment compensation benefits. Indeed, they undoubtedly would not need them since the employer would have to give in to their demands. Yet those in need of assistance because the employer is able to operate successfully in spite of the union's economic pressure would be aided.⁷ As this Court recently emphasized in *Machinists Union v. Wisconsin Employment Relations Commission, supra*:

(T)he economic weakness of the affected party cannot justify state aid contrary to federal law for, "as we have developed, the use of economic pressure by the parties to a labor dispute is not a grudging exception (under)... the (federal) Act; it is part and parcel of the process of collective bargaining." *Insurance Agents*, 361 U.S., at 495. The state action in this case is not filling "a regulatory void which Congress plainly assumed would not exist," *Hanna Mining Co. v. Marine Engineers*, 382 U.S., at 196 (Brennan, J., concurring). Rather, it is

the Supreme Court of New Mexico has interpreted this phrase in the context of a labor dispute to require only that a striker seek temporary intervening work. *Albuquerque Phoenix Express, Inc. v. Employment Security Comm'n.*, 88 N.M. 596, 598-99, 544 P.2d 1161, 1163-64 (1975) (Jurisd. Stat., Appendix at 4a, 6a-7a).

⁷ The Solicitor General would minimize the impact of the payment of unemployment compensation benefits in this case by the fact that the Employment Security Commission did not make its award until the strike had been over for six months. However, as noted by Mr. Justice Blackmun in the *Super Tire* case, 416 U.S. at 123, the impact of the payment of public assistance benefits to strikers affects not only the specific strike at issue but also the "ongoing relationship" and must have a presumed effect on future strikes. Also, it should be noted that in response to the decision of this Court in *California Dept. of Human Resources Dev. v. Java*, 402 U.S. 121 (1971), the New Mexico Legislature amended the New Mexico unemployment compensation law in 1972. Section 59-9-6F N. M. Stat. Ann. (2d Repl. 1974) now provides that benefits must be paid immediately upon a determination of eligibility by a deputy, subject to a right of appeal.

clear beyond question that Wisconsin "(entered) into the substantive aspects of the bargaining process to an extent Congress has not countenanced." *NLRB v. Insurance Agents, supra* at 498. 96 S. Ct. at 2557.

C. Among Other Reasons Militating in Favor of Plenary Review by the Court, There Exists a Conflict of Decisions Requiring Resolution by the Court.

In *Grinnell Corp. v. Hackett, supra*, the First Circuit found the record regarding Congressional intent concerning whether payment of unemployment benefits to strikers would infringe upon federal labor policy to be ambiguous. Therefore, the court remanded the case for an evidentiary hearing concerning the impact of the payment of unemployment compensation benefits upon strikes. The Solicitor General, on the other hand, urges summary affirmance of this case since unambiguous Congressional intent establishes that Congress left to the states full discretion to determine whether unemployment compensation benefits ought to be paid to strikers. (Mem. U.S. at 5-9). Thus, there is a clear conflict between views of the First Circuit in *Grinnell Corp.* and the District Court in *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations, supra*, and the views of the Solicitor General.

Here the District Court concluded:

Under the facts of this case payment of unemployment compensation benefits to the claimants herein would interfere with the national policy of Federal Labor Law of encouraging self organization and collective bargaining without state interference in the use of economic weapons available to both labor and management, including the policies enunciated in 29 U.S.C. §§157-158, in contravention of the Supremacy Clause of Article VI of the Constitution of the United States. (R. 174; Jurisd. Stat. at 7).

Even though it reversed the District Court's decision, the Supreme Court of New Mexico did not disturb this conclusion and did not examine the underlying facts alleged to constitute the interference. Under these circumstances, the decision of the New Mexico Supreme Court can logically be based only upon agreement with the conclusion of the Solicitor General concerning the legislative history. Thus, the decision of the Supreme Court of New Mexico in this case is squarely in accord with the views expressed by the Solicitor General and is in conflict with the decisions of the First Circuit and the United States District Court for the District of Hawaii. Such conflict should be resolved by this Court.

The timeliness and importance of the issue raised in this case are underscored by the cases currently pending before this Court concerning the constitutionality of the payment by state governmental agencies of public assistance benefits to strikers. In addition to this case, two other cases are before the Court, *Chamber of Commerce of the United States of America v. Frances*, petition for cert. filed, 44 U.S.L.W. 3494 (U.S. Feb. 19, 1976) (No. 75-1182), involving the question of whether striker eligibility for welfare benefits is constitutional, and *Ohio Bureau of Employment Services v. Hodory*, appeal filed, 44 U.S.L.W. 3686 (U.S. May 25, 1976) (No. 75-1707), involving the question of whether a state might permissibly deny unemployment compensation benefits to nonstriking employees who are laid off solely because of a strike. Together, these three cases present significant unanswered questions concerning the permissibility of public assistance to strikers and other workers idled as a consequence of a strike.⁸

The fact that a number of cases involving the same issue are currently being litigated in lower courts also suggests a need

⁸ Indeed, this case involves payment of unemployment compensation benefits not only to strikers but also to employees who were locked out by members of the industry bargaining group. (Jurisd. Stat. at 5). Thus, the case affords the opportunity to consider whether there are different considerations involved in payment of unemployment compensation benefits to locked out employees as opposed to strikers.

for some action.⁹ Finally, the submission of briefs as *amicus curiae* by the Chamber of Commerce of the United States and others is also an indication of the importance of the issue raised.

CONCLUSION

For the foregoing reasons and for the additional reasons set forth in Appellants' Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

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⁹ The cases and their current status are cited at pages 2 and 3 of the Motion of the Chamber of Commerce of the United States of America for leave to file a brief as *amicus curiae* filed herein.









